

**AGREEMENT FOR THE MANAGEMENT OF THE SAN JOSE CONVENTION CENTER AND
CULTURAL FACILITIES**

BETWEEN THE CITY OF SAN JOSE

AND

TEAM SAN JOSE

FROM July 1, 2014 TO June 30, 2019

DATED: _____, 2014

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**AGREEMENT FOR THE MANAGEMENT OF
THE SAN JOSE CONVENTION CENTER AND CULTURAL FACILITIES
BETWEEN
THE CITY OF SAN JOSE
AND
TEAM SAN JOSE**

THIS AGREEMENT for Management of the San José Convention Center and Cultural Facilities ("Agreement") is entered into effective as of the ____ day of _____ 2014, by and between the CITY OF SAN JOSÉ, a municipal corporation (hereinafter "City"), and TEAM SAN JOSE, a California nonprofit mutual benefit corporation (hereinafter "TSJ").

RECITALS

A. The City and TSJ are currently parties to an Agreement for the Management and Operation of the San José Convention Center and Cultural Facilities dated July 1, 2004, as amended (the "Original Agreement").

B. The Original Agreement is due to expire on June 30, 2014.

C. The City and TSJ desire to enter into a new Agreement for the Management and Operation of the San José Convention Center and Cultural Facilities for the purpose of (1) extending the term of TSJ's management, (2) implementing changes to the terms of TSJ's management, and (3) promoting the growth and enhancement of the community, encouraging visitors to the City, and promoting the holding of conventions, conferences, and trade shows in the City.

NOW, THEREFORE, in consideration of the following mutual promises, covenants and agreements, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, City and TSJ agree as follows:

AGREEMENT

SECTION 1. DEFINITIONS.

1.1 **Additional Term** has the meaning set forth in SECTION 5.2.

1.2 **Adopted Operating Budget** has the meaning set forth in SECTION 9.2(d).

1.3 **Agreement Documents** means, collectively, the documents forming the entire agreement between City and TSJ, consisting of this Agreement, the Schedules attached hereto, and the following Exhibits:

EXHIBIT A – Convention Center Parking Operations

EXHIBIT B – Insurance

EXHIBIT C – Emergency Procedures

EXHIBIT D – Labor Compliance Addendum

EXHIBIT E – Facility Use Agreement Form

EXHIBIT F – 2013 - 2014 Adopted Operating Budget

EXHIBIT G – Internet Service Access Addendum

- 1.4 **Bay Area Non-Profit** means a non-profit entity or 501(c) tax-exempt entity that operates from or has a principal executive office in one or more of the nine San Francisco Bay Area counties.
- 1.5 **Bonds** has the meaning as set forth in SECTION 8.4 of this Agreement.
- 1.6 **Business Day** means any day during which both City and TSJ offices are open to the public.
- 1.7 **Capital Budget** means the amount budgeted for construction of Capital Improvements and Repairs, as set forth from year to year in the Adopted Operating Budget.
- 1.8 **Convention Center Capital Facilities Advisory Committee** has the meaning as set forth in SECTION 12.2 of this Agreement.
- 1.9 **Capital Improvements and Repairs** means those improvements, repairs and replacements of capital items at the Facilities, including fixtures, machinery and/or equipment (as distinguished from normal maintenance) which are necessary to improve, repair or replace, over time, capital items which are subject to wearing out after a useful life. Examples are roofs, floors, carpeting, chairs, tables, audio-video equipment and mechanical systems. Capital Improvements and Repairs can also be those improvements that are not required to repair or replace faulty or worn out capital items, but are made to improve the quality or functioning of the Facilities. These Capital Improvements and Repairs can be forecasted and budgeted for. As an example, the cost of replacement of a boiler due to normal wear and tear is a normal Capital Improvement and Repair.
- 1.10 **Capital Improvement Reserve** has the meaning set forth in SECTION 10.8(a).
- 1.11 **Capital Industry Advisor** has the meaning set forth in SECTION 4.6.
- 1.12 **City Charter** means the City Charter of the City of San José, California.
- 1.13 **City Council** means the governing body of the City.
- 1.14 **City Industry Advisor** means the person or firm engaged by City to provide convention industry specific advice with respect to the setting and attainment of Performance Measures and Weighted Percentages who must have not less than five years relevant experience in the convention business.
- 1.15 **City Manager** means the City Manager of the City.
- 1.16 **City's TOT Fund** means the fund derived from assessment of the City's transit occupancy tax.
- 1.17 **City Use Funding** has the meaning set forth in SECTION 8.5(a).
- 1.18 **Commencement Date** means July 1, 2014.

- 1.19 **Complex Improvement Projects** has the meaning set forth in SECTION 12.11(b)
- 1.20 **Contract Administrator** means the individual designated from time to time in writing by the City Manager to have overall management responsibilities for this Agreement.
- 1.21 **Contractor** means any licensee, user, advertiser, concessionaire, or other person who has entered into a contract with City or TSJ with respect to the Facilities.
- 1.22 **Convention Center** means the San José McEnery Convention Center, which is part of the Facilities.
- 1.23 **Convention Center Parking Garage** means the multiple level parking structure connected to the Convention Center.
- 1.24 **CPA** means the San José Center for the Performing Arts.
- 1.25 **CVB** means the San José Convention and Visitors Bureau.
- 1.26 **CVB Agreement** means the agreement between the City and TSJ for marketing and promotion services, and such successor agreements as they become effective, as entered into concurrently herewith.
- 1.27 **CVB Approved Budget** means the Approved Budget from time to time in effect pursuant to the CVB Agreement.
- 1.28 **Debt Instruments** has the meaning set forth in SECTION 8.3(a).
- 1.29 **Designated Convention Centers** means convention centers located in the United States that have similar characteristics to the Convention Center and are located in cities with demographics similar to City.
- 1.30 **DOT** means the San José Department of Transportation.
- 1.31 **Effective Date** means TBD, 2014
- 1.32 **Emergency Capital Repairs and Replacements** means those capital repairs and replacements that must be accomplished immediately, or as soon as possible, in order to remove a hazard to health or safety, ensure the structural integrity of a Facility, or resolve a condition that causes a Facility to be non-operational.
- 1.33 **External Auditor** means the independent certified public accountant mutually selected by City and TSJ.
- 1.34 **Facility or Facilities** means the Convention Center, Civic Auditorium, CPA, Montgomery Theatre, Parkside Hall, California Theatre, South Hall, Montgomery Courtyard, and the exterior building landscaping, irrigation, hardscape grounds, paseos, plazas, and outdoor furniture and lighting infrastructure associated with

each of such buildings, including any expansions or alterations of said Facilities as provided in SECTION 12.10.

- 1.35 **Fiscal Year** means the annual period beginning July 1 and ending June 30.
- 1.36 **Fixed Management Fee** means that portion of the Adopted Operating Budget attributable to payment of a portion of the Operating Expenses related to the management of the Facilities as more particularly described in SECTION 7.1.
- 1.37 **Fund 536** has the meaning set forth in SECTION 10.4(a).
- 1.38 **Fund 536 Transfers** has the meaning set forth in SECTION 10.4(b).
- 1.39 **Funds Availability** has the meaning set forth in Section 4.2.
- 1.40 **GAAP** means generally accepted accounting principles as applied in the United States.
- 1.41 **High Impact Use** has the meaning set forth in SECTION 8.5(l).
- 1.42 **Incentive Fee** has the meaning set forth in SECTION 7.2.
- 1.43 **Incentive Fee Measure Percentage** has the meaning set forth in SECTION 7.4.
- 1.44 **Income Statement** means the profit and loss statement detailing the operations of TSJ with respect to the management of the Facilities.
- 1.45 **Initial Term** has the meaning set forth in SECTION 5.1.
- 1.46 **JAMS** means Judicial Arbitration and Mediation Services.
- 1.47 **Knowledge**, when used in connection with a representation or warranty that is made to the Knowledge or to the best Knowledge of TSJ, means that the representation or warranty is made based on the current awareness of facts by the Chief Executive Officer of TSJ.
- 1.48 **Losses** has the meaning set forth in SECTION 18.
- 1.49 **Material Adverse Effect** means any event, circumstance, condition, fact, effect or other matter which has had or could reasonably be expected to have a material adverse effect on (1) the business, assets, financial condition, results of operations, employee relations, customer or supplier relations, or prospects of a party to this Agreement, except for any event, circumstance, condition, fact, effect or other matter which has had a material adverse effect on the United States economy generally, or (2) the ability of a party to this Agreement to perform on a timely basis any material obligation under this Agreement or to consummate the transactions contemplated hereby.
- 1.50 **Notice of Termination** has the meaning set forth in SECTION 6.2.
- 1.51 **OEA** has the meaning set forth in SECTION 17.

- 1.52 **Operating Account** has the meaning set forth in SECTION 10.2.
- 1.53 **Operating Account Audit** has the meaning set forth in SECTION 10.9.
- 1.54 **Operating Cash Balance Threshold** means the minimum cash balance to be maintained in the Operating Account from time to time during the term of this Agreement, which amount is agreed to be \$50,000.00 until modified.
- 1.55 **Operating Deficiencies** has the meaning set forth in SECTION 10.4(b).
- 1.56 **Operating Expenses** means the operating expenses approved by the TSJ Board of Directors.
- 1.57 **Operating Revenue** means the gross revenues generated from the operation of the Facilities.
- 1.58 **Operating Term** means the period of the Initial Term plus any Additional Terms, each as defined in SECTION 5.3.
- 1.59 **Operating Year** means each 12-month period of time during the Operating Term during which the Facilities are operating commencing respectively on July 1, 2014, and on each successive anniversary of such date thereafter.
- 1.60 **Overhead** means the portion of City's centralized costs attributable to City administration expenses allocable to TSJ.
- 1.61 **Oversight Expense** means the cost of City staff and related expenses specifically allocable to the management of the Agreement.
- 1.62 **Performance Audit Report** has the meaning set forth in SECTION 4.11(c).
- 1.63 **Performance Auditor** means an independent hospitality or convention center industry consultant mutually selected by City and TSJ who has not less than five years' experience in reviewing, consulting for, and/or auditing hospitality and convention center business operations located in similar municipal markets.
- 1.64 **Performance Measures** has the meaning set forth in SECTION 4.9.
- 1.65 **Policy** has the meaning set forth in SECTION 17.
- 1.66 **Proposed Operating Budget** has the meaning set forth in SECTION 9.2(a).
- 1.67 **Quarterly Report** has the meaning set forth in SECTION 4.12.
- 1.68 **Receipts Account** has the meaning set forth in SECTION 10.1.
- 1.69 **Resident Arts Partner** means Symphony Silicon Valley, Ballet San Jose, Opera San Jose, and Children's Musical Theater of San Jose.
- 1.70 **Revenue Stabilization Reserve** has the meaning set forth in SECTION 10.8(b)

- 1.71 **Special Reporting Metrics** has the meaning set forth in SECTION 4.10.
- 1.72 **Standard Maintenance Projects** has the meaning set forth in SECTION 12.11(a).
- 1.73 **Theater or Theaters** means the California Theatre, CPA, Civic Auditorium and Montgomery Theater.
- 1.74 **TOT Revenues** has the meaning set forth in SECTION 10.4(a).
- 1.75 **TOT Transfer** has the meaning set forth in SECTION 10.4(a).
- 1.76 **TSJ Employees** means all persons employed by TSJ.
- 1.77 **Weighted Achievement Percentage** has the meaning set forth in SECTION 4.9.
- 1.78 **Weighted Percentage** has the meaning set forth in SECTION 4.9.

SECTION 2. PURPOSE.

The purpose of this Agreement is to provide for the management and operation of the Facilities by TSJ consistent with the goals of the City. The Facilities shall be operated in the public interest. The Facilities are owned by the City to create positive economic impact, to stimulate growth for the region, and to provide for the cultural enrichment of the community, and TSJ recognizes these goals in programming for the Facilities. TSJ shall exercise its best efforts to optimize use of the Facilities in a manner that both (1) serves the public and community interest through economic impact and driving business activity within the City, and (2) attracts convention and conference events that will bring out of town visitors and attendees to the City. City seeks to protect its investment in the Facilities and requires TSJ to support this objective through high quality service and supervision of repairs and routine maintenance of the Facilities.

SECTION 3. TSJ'S REPRESENTATIONS AND WARRANTIES.

TSJ represents and warrants to City that:

- 3.1 **No Actions, Suits or Proceedings Pending.** There are no actions, suits or proceedings pending or, to the Knowledge of TSJ, threatened against or affecting TSJ which could have a Material Adverse Effect on the ability of TSJ to honor its obligations under this Agreement or that involve the enforceability of this Agreement, at law or in equity.
- 3.2 **No Default or Violation.** TSJ is not in default in violation of, operating under, or subject to, any order, writ, injunction, decree or demand of any court or any governmental authority.
- 3.3 **No Breach.** The consummation of the transactions hereby contemplated and the performance of this Agreement will not result in any breach of, or constitute a default under, any mortgage, deed of trust, lease, bank loan or credit agreement, partnership agreement, corporate charter, bylaw, or other agreement or instrument to which TSJ is a party or by which it or any of its assets may be

bound or affected.

- 3.4 **TSJ's Solvency.** TSJ is not insolvent (as such term is defined in the Bankruptcy Code of 1978, 11 U.S.C. Section 101, *et seq.*, as amended) and will not be rendered insolvent by execution of this Agreement or the consummation of the transactions contemplated hereby.
- 3.5 **No Claims Against Agreement.** TSJ has no counterclaims, offsets or defenses with respect to this Agreement.

SECTION 4. SCOPE OF SERVICES.

TSJ shall perform the following services:

- 4.1 **Engagement.** City and TSJ agree that TSJ is hereby engaged to operate and manage the Facilities on behalf of the City on the terms set forth in this Agreement, although in compliance with agreed upon performance expectations and city, state, and federal rules, regulations, and laws. The nature of this engagement is that of an independent contractor, and nothing herein shall be considered to create an agency, joint venture, partnership, or subsidiary relationship. City and TSJ agree that neither party shall hold itself out as, act as, or be the agent of the other without the express written authority of such other party.
- 4.2 **Standard for Performance.** The standard for performance of services by TSJ will be in accordance with the express provisions of this Agreement and, where not expressed, in accordance with generally accepted industry standards. Without limiting the generality of the foregoing, TSJ agrees to perform and furnish management services, systems, and materials needed to operate, supervise, manage, and maintain the Facilities in the most efficient manner possible, consistent with the operations of other similar facilities located in similar municipal markets. Notwithstanding the foregoing or any other provision of this Agreement, TSJ's standard of performance, satisfaction of Performance Measures, and compliance with all of the terms of this Agreement, both individually and in the aggregate, shall at all times be subject to the parameters, limitations, and restrictions of the Adopted Operating Budget, the CVB Approved Budget, and the availability of funds (collectively "Funds Availability") sufficient to enable TSJ to satisfy the performance standards set forth herein and to perform each of its obligations hereunder, and all of the provisions of this Agreement shall be subject to Funds Availability.
- 4.3 **Grant of Authority.** Subject to the policies, procedures, budgets, and guidelines set forth in this Agreement, as may be amended from time to time by mutual agreement, TSJ is hereby delegated full, actual, and exclusive authority by City (including, without limitation, exclusive as to City) over the day-to-day management and operation of the Facilities, and all activities therein, and hereby assumes responsibility for the administration of all contracts affecting the management and operation of the Facilities. It is understood and agreed that, while TSJ has certain reporting obligations to City under this Agreement, TSJ is granted and shall have full and exclusive authority to operate the Facilities in a manner determined by TSJ and without seeking the approval from City except as

required in the context of developing and adopting the Adopted Operating Budget or as otherwise specifically required under this Agreement.

4.4 Administrative and Management Services. In furtherance of TSJ's obligations under this Agreement, TSJ shall:

- (a) Operate and manage all aspects of the Facilities, including, but not limited to, purchasing, payroll, fire prevention, security, routing, repairs, preventative maintenance, janitorial services, promotions, energy conservation, admission procedures, booking systems, and general user services. All outdoor advertising shall be subject to approval by the City and City's bond counsel. To the extent permitted within the limits of the Adopted Operating Budget, the means and methods of management will effectively accommodate the needs of disabled patrons.
- (b) Administer all contracts that are required in the ordinary course of business of operating the Facilities, including, but not limited to, performers, agents, services, events, concessions, catering, novelties/merchandise, advertising, equipment, and licenses. TSJ shall assure compliance with City's insurance requirements and manage claims as required to minimize risk to City.
- (c) Maintain and supervise a staff of trained employees and/or contractors at the Facilities as TSJ determines to be reasonably necessary to perform the services hereunder. The employees of TSJ, or of any subcontractor, will be employees of TSJ or subcontractor and not of City.
- (d) Except as otherwise provided in this Agreement, collect all revenues generated through the operation of the Facilities, and make expenditures, all in accordance with SECTION 10. TSJ shall develop short and long-term objectives for the Facilities to enhance financial success of the Facilities and annually report same to City.
- (e) Attend and participate in such meetings of City Council and City Committees as are reasonably and timely requested by the Contract Administrator.
- (f) TSJ shall not provide management, sales, marketing or any similar services to any other venues or public/private entities, without the City's written permission.

4.5 Operating Services. TSJ shall:

- (a) Ensure that the Facilities are maintained in good order and repair and in a clean, safe, and sanitary condition.
- (b) Provide operation, maintenance, and repair services, by competent and qualified employees or subcontractors, with respect to all of the following:
 - (i) building envelope and interior structure and finishes
 - (ii) HVAC, mechanical, telephone, electrical, and plumbing systems;
 - (iii) seating, elevator, sound, lighting, and fire and security monitoring systems;
 - (iv)

furniture, fixtures, and equipment; and (v) landscape and grounds maintenance. TSJ shall maintain equipment in a manner that meets or exceeds manufacturer's recommendations for maintenance taking into account the age thereof.

- (c) Establish and provide the Contract Administrator on an annual basis with a schedule of preventive maintenance and renovation action items that TSJ determines, in its considered judgment, are necessary to be addressed in order to maintain the Facilities in a superior condition consistent with facilities of similar size in California, taking into account funding levels and the age and usage of the Facilities. TSJ shall also provide the Contract Administrator with a report, within 60 days after the last day of each Operating Year, of all Facility maintenance that was performed during the preceding year and of all Facility maintenance scheduled for the then current year. This report shall include a list of the breakdowns of all major pieces of installed and portable equipment for that year.
- (d) Institute for City any and all legal actions or proceedings to collect charges, rentals, or other income generated by and due to City, or to cancel or terminate any license, use, concession agreement, or other contract for the breach thereof or default thereunder by any Contractor; provided, however, TSJ is not required to institute legal proceedings if, in the reasonable judgment of TSJ and City the parties mutually agree in writing that the cost of such proceedings will outweigh any expected recovery. Legal expenses for actions approved under the terms of this SECTION 4.5(d) shall be included as an Operating Expense of the Facilities to the extent that such cost and expense is not recovered or recoverable by TSJ with reasonable due diligence from the Contractor or from any insurance proceeds (including, without limitation, proceeds from any policy that TSJ is required to maintain hereunder).
- (e) City and TSJ shall perform such services and have such responsibilities as are set forth in the Convention Center Parking Operations (EXHIBIT A) ("CONVENTION CENTER PARKING OPERATIONS"). City and TSJ may amend Exhibit A from time to time. All such amendments shall be approved in writing by City Manager and TSJ's Chief Executive Officer.

4.6 **Capital Industry Advisor.** In furtherance of the obligations under SECTION 4.5 and SECTION 12, City and TSJ shall mutually select a capital industry advisor having not less than five years' experience with the convention facilities ("Capital Industry Advisor") to provide input and advice with respect to maintenance, repairs and capital improvements with respect to the Facilities. The fees of the Capital Industry Advisor will be paid by TSJ as an Operating Expense and will be included in the Adopted Operating Budget.

4.7 **Inspection.** City shall have access to the Facilities during normal operating hours for routine maintenance inspections subject to conflicting activities of users of the Facilities as set forth in SECTION 22. In addition, upon mutual agreement, the City and TSJ shall select a consultant to provide inspection services and to review the preventative and corrective maintenance activities of the Facilities on

a quarterly basis. The City and TSJ shall review the preventive and corrective maintenance activities of the Facilities at the quarterly development meetings. Those deficiencies that are under TSJ's control to correct shall be addressed and prioritized in the Capital Improvement Program. Funding for the quarterly inspections will occur through Fund 536.

4.8 General Facility Management Services. TSJ shall provide, or cause to be provided, facility management services for conventions, trade shows, performing arts, community events, family shows, concert arena events, and other events at the Facilities. TSJ is also responsible for the following:

- (a) Preserving the City's commitment to provide venues that satisfy the community's diverse public assembly needs.
- (b) Developing and implementing a customer service program to provide exceptional customer service to all visitors and guests of the Facilities.
- (c) Developing forms to contract for Facilities rental, electrical, and other event services for conventions, trade shows, performing arts, concerts, community events, and other events as may be required.
- (d) Developing, as part of the Adopted Operating Budget, revenue and rental/charge structures and procedures related to facility use, equipment use, and services provided by the Facilities.

4.9 Performance Measures. The Adopted Operating Budget, as adopted from year to year during the Operating Term in accordance with the procedures set forth in SECTION 9.2, shall (a) define the specific measurements for each of the Performance Measures described below, (b) establish the sole criteria under this Agreement by which satisfaction of Performance Measures will be determined for each Operating Year, and (c) assign a weighted percentage to each category of Performance Measure ("Weighted Percentage") for purposes of measuring TSJ's performance under this Agreement. The categories of performance goals by which TSJ's performance shall be measured (based on criteria established in the Adopted Operating Budget from year to year) ("Performance Measures"), and the Weighted Percentage assigned to each category, shall consist of the items and percentages set forth in this SECTION 4.9. The development of specific performance criteria to be assigned from year to year to each of the components within each of the Performance Measures shall be the initial responsibility of TSJ in connection with the preparation of the Proposed Operating Budget as set forth in SECTION 9.2(a) and subject to City Manager approval. The performance criteria with respect to the Performance Measures for a particular Fiscal Year shall be established by, and as part of, the Adopted Operating Budget. In the event there is no mutual agreement between TSJ and City Manager, City Council shall have the right to unilaterally adopt the annual performance measures after consultation with TSJ and City Industry Advisor. In the event that, during a Fiscal Year, it becomes necessary to make adjustments to the Adopted Operating Budget or the CVB Approved Budget as a result of TOT Revenues of 15% above or below the forecasted amount, the Performance Measures for the subject Operating Year may be concurrently adjusted commensurate with the additional or reduced funding. Within 150 days after the end of each Fiscal Year, a

weighted percentage will be calculated as the product of the extent to which TSJ met or exceeded the Performance Measure criteria for the subject Fiscal Year multiplied by the Weighted Percentage assigned to such Performance Measure (the "Weighted Achievement Percentage"). In the event that the results of TSJ's performance exceeds the Performance Measure criteria set forth in the Adopted Operating Budget, then the Weighted Percentage for that Performance Measure shall be multiplied by a percentage that reflects the extent to which the results of TSJ's performance exceeds the established base line. By way of example, and not by way of limitation, if a Performance Measure is assigned a Weighted Percentage of 40%, and it is determined that TSJ met 110% of the performance criteria for such Performance Measure, then TSJ would have a Weighted Achievement Percentage of 44% with respect to such Performance Measure ($40\% \times 110\% = 44\%$). Sample calculations of the Weighted Achievement Percentage using a weighted scorecard approach are set forth in Schedule 4.9 to this Agreement. The Performance Measures and Weighted Percentages assigned to each category are described as follows:

- (a) **Economic Impact Measures.** This category of Performance Measure is assigned a Weighted Percentage of 40%. By managing the strategic mix of business and visitor types, TSJ will focus on total attendance for events and direct spending associated with the Facilities. Components of this Performance Measure will include measurement of hotel room nights booked, and attendance of local, out-of-town, and exhibit visitors. The specific components of this Performance Measure (each of which will be weighted equally) will consist of the following:
 - (i) **Hotel Room Nights.** Measured as (A) the total number of future hotel room nights committed by the CVB over the course of the Fiscal Year and (B) the total number of hotel room nights committed that can be directly or indirectly attributed to activities at the Facilities.
 - (ii) **Attendance.** Applying the methodology described on Schedule 4.9(a)(ii), TSJ will measure and report the following visitor types and attendance:
 - (1) **Local/Social visitors.** Attendees who do not require overnight accommodations. For events where there are no hotel room nights attached, all attendees are counted as Local/Social visitors (with the exception of any Exhibitor attendees).
 - (2) **Out of Town visitors.** Attendees who require overnight accommodations.
 - (3) **Exhibitors.** Attendees whose focus is to exhibit products, services, etc., to visitors attending the host event.
 - (iii) **Estimated Economic Impact (EEI).** A measure of direct visitor spending to be determined based on industry standard multiplier models mutually agreed upon by TSJ and the City. The

components of calculating this measure and the formula for applying the subject components to achieve a numerical result (the "Economic Impact Matrix") will be set forth on Schedule 4.9(a)(iii) attached hereto, as amended from time to time during the Operating Term. Without limiting the generality of the foregoing, the components for calculating this measure shall include, without limitation, sales tax revenues arising from direct spending attributable to convention activity. Notwithstanding the foregoing, it is agreed that, for the first year of the Operating Term, the matrix used by Destination Marketing Association International (DMAI) will be used to calculate the Economic Impact Matrix.

- (iv) **Return on Investment (ROI).** A measure of the City's return on investment ("ROI") shall be calculated each Fiscal Year pursuant to a formula (the "ROI Formula") designed to determine the amount of revenue generated from the operation of the Facilities and CVB as compared to the cost of generating such revenue. In connection with the process for approving the Adopted Operating Budget, the parties shall meet and confer to discuss the appropriateness of the then current ROI Formula and to assess whether or not a replacement formula should be developed to measure the City's return on investment. In the event a new ROI Formula is adopted, it shall be effective on the first day of the immediately following Fiscal Year. The target ROI shall be set each year in connection with establishing the Adopted Operating Budget. Initially, the parties agree that the ROI shall be equal to that fraction:

- (1) The **numerator** of which is equal to the sum of:

- a. The aggregate accrued gross revenues from the operation of the Facilities during the Fiscal Year, plus
- b. Economic Impact Matrix as determined under SECTION 4.9(a)(iii) for the subject Fiscal Year, plus
- c. Transient Occupancy Tax receipts allocated to Convention and Cultural Affairs Fund for the year that is being measured, plus
- d. Revenues generated at the Convention Center Parking Garage.

- (2) The **denominator** of which is equal to the sum of:

- a. Direct and indirect expenses paid by TSJ during the Fiscal Year, including capital investment, on account of the operation of the Facilities, plus
- b. The amount actually paid by the City during the

Fiscal Year on the debt service due on bonds issued solely in connection with the financing of the original construction and/or expansion of the Facilities, plus

- c. The Fund 536 allocation of the City Oversight Expenses, plus
- d. Operating Expenses associated with Convention Center Parking Garage, plus
- e. Debt service associated with repayment of Commercial Paper for the Convention Center expansion/renovation project to the extent not paid or funded by other funding sources (e.g., Convention Center Facilities District Tax), plus
- f. Marketing expenses distributed from Fund 536 to CVB.

(b) **Gross Operating Profit.** This category of Performance Measure is assigned a Weighted Percentage of 40%. As part of City's annual budgeting process and the approval of the Operating Budget, TSJ and City will mutually agree on a target Gross Operating Profit from the operation of the Facilities. The revenue component for calculating Gross Operating Profit will consist of those revenues from operation of the Facilities listed above the "Total Revenue" line of the sample form of Income Statement attached hereto as Schedule 4.9(b) (the "Sample Income Statement"), and will include, without limitation, revenue billed by TSJ on behalf of other vendors providing services to clients at the Facilities, Convention Center Parking Garage revenue, and Transient Occupancy Tax revenue. Fund transfers from the CVB Approved Budget shall not be included in Total Revenue. In connection with the process for approving the Operating Budget, and subject to the mutual agreement of the parties, the components of the Sample Income Statement may be modified during the annual budget process, in which event the modified form of Sample Income Statement shall be attached to this Agreement as a supplemental Schedule 4.9(b) to be effective under the Adopted Operating Budget for the subsequent Fiscal Year. The expense component for calculating Gross Operating Profit will consist of the direct and indirect expenses identified on the Sample Income Statement. Without limiting the foregoing, it is agreed that City Directed Expenses and City Overhead will be calculated below the Gross Operating Profit line. For purposes of this Agreement, the term "City Directed Expenses" means all expenditures paid directly by City or incurred by City in connection with the operation of the Facilities, including, without limitation, City Oversight Expenses, City Overhead Expense, fire insurance premiums, Emergency Capital Repairs and Replacements of capital assets, and depreciation expense.

(c) **Theater Performance.**

- (i) This category of Performance Measure is assigned a Weighted Percentage of 10% and will measure both "activation" of the Theaters and overall "utilization" of the Theaters. Activation of the Theaters will be measured by the extent to which TSJ maintains or increases use of the Theaters with respect to "Performances," and utilization of the Theaters will be measured by the extent to which the TSJ maintains or increases the use of the Theaters with respect to "Special Events" during the Fiscal Year.
- (ii) In assessing activation and utilization, it is agreed that the number of Performances and Special Events will be measured against, and as a percentage of, Available Use Days (defined as calendar days during the Fiscal Year that are both available and suitable for booking of Performances and Special Events), it being understood and agreed that all calendar days are not necessarily marketable for performance of public or private events. TSJ and City shall determine the number of Available Use Days for an upcoming Fiscal Year during the budget process, and shall adjust Available Use Days during the year based on circumstances. For example, and without limitation, if a Facility is damaged due to an unforeseen event and is, as a consequence, temporarily not available for Performances and/or Special Events, then the number of Available Use Days for that Facility will be reduced by the number of days that the Facility is unavailable during the period of repair.
- (iii) For purposes of measuring activation of the Theaters and satisfaction of the Theater Performance category of Performance Measures, if a Resident Arts Partner or Bay Area Non-Profit reserves the use of a Theater and subsequently cancels one or more days of reserved use within ninety (90) days prior to the scheduled event, then the number of days reserved to such use will be treated as if they were actually used.
- (iv) For purposes of this Agreement, "Performances" means and includes, without limitation, scheduled dances, theatrical, sports, musical, comedy, speaker series, or other cultural performances or events that are generally available for general public attendance, whether or not tickets are issued with respect thereto. For the further purposes of this Agreement, "Special Events" means private events that are not open to the general public. "Performances" shall be weighted at 5%, representing one-half of the total theater Performance weighted measure of 10%. "Special Events" means all days that a Theater is utilized under contract for a private event. "Special Events" shall be weighted at 5%, representing one-half of the total theater Performance weighted measure of 10%. In the event that multiple Performances and/or Special Events occur in a single Facility during a single day, each such Performance and/or Special Event shall be counted in determining activation and utilization of the Facilities.

- (d) **Customer Service Survey Results.** This category of Performance Measure is assigned a Weighted Percentage of 10%. TSJ will ask the decision maker of each event to rate their overall satisfaction with the product and services provided. TSJ will create a standard survey instrument containing a series of product and service rating metrics, including the following summary question: "Based on the services provided, please rate our overall performance." The post facility use survey data will be sent directly to the Contract Administrator for review. In addition, TSJ will work on developing an attendee survey to be distributed to convention attendees, subject to approval of the convention sponsor and funding availability. Periodically, Contract Administrator and TSJ shall review and discuss the survey data and identify, as necessary, areas for additional TSJ attention and improvement.
 - (e) **Parking Revenue Adjustment.** It is acknowledged that the Convention Center Parking Garage and Structure (i) will continue to be managed by the City, and (ii) is not part of the Facilities being managed by TSJ. It is further acknowledged and agreed that revenue and expenses associated with the Convention Center Parking Garage will be collected, paid and controlled by City; provided, however, such revenue and expenses will constitute a component of the Performance Measures under SECTIONS 4.9(a)(iv) and 4.9(b). City and TSJ shall mutually establish an annual revenue and expense budget for the Convention Center Parking Garage operations.
- 4.10 **Special Reporting Metrics.** TSJ shall provide City with reports on the activity described below in this SECTION 4.10 (the "Special Reporting Metrics"); provided, however, the subject reporting shall be used for general oversight purposes only, and the results derived therefrom will not be part of the Performance Measures, nor will such results be weighted in evaluating TSJ's performance under this Agreement. Additionally, TSJ shall provide such other reports on metrics that City and TSJ agree are useful to analysis of the management of the Facilities. The Special Reporting Metrics are as follows:
 - (a) **Theater Operations Report.** The Theater Operations Report shall include a profit and loss statement for each Theater and shall further provide City with information regarding the sources of revenue generated from operations at each Theater, expenses of operation at each Theater, the amount of the TOT Transfer allocated to maintaining operations at each Theater, and the amount of other forms of City funding to support the operation of the Theaters, including, both capital and non-capital expenditures. The Theater Operations Report shall further provide information as to the number of Performance and Special Event Days that the applicable Theaters are used by the then resident users of such Theaters.
 - (b) **Benchmark Convention Business.** During the second and fourth years of each Term, TSJ, in coordination with City and subject to funding, will evaluate the need to prepare a report (the "Benchmark Survey") comparing the Convention Center operations to at least five Designated Convention Centers based on a set of comparison metrics to be mutually

agreed to by City and TSJ. Funding for the Benchmark Survey will be subject to the approved Adopted Operating Budget for the years in which the Benchmark Survey is to be produced.

4.11 Annual Performance Audit.

- (a) Within 150 days after the end of each Operating Year, the City (through its Director of Finance or other authorized officer) shall cause a performance audit to be conducted and completed by (1) the City Auditor or (2) the Performance Auditor (the person or firm so selected referred to herein as the "Auditor"). The performance audit shall assess TSJ's performance during the Operating Year just ending, taking into account applicable funding levels both under this Agreement and under the CVB Agreement, and shall propose the achieved Weighted Percentages with respect to each of the Performance Measures and the resulting Weighted Achievement Percentage for the subject Operating Year. A draft of the performance audit report shall be made available for comment by City and TSJ prior to completion of the audit.
- (b) TSJ shall have 30 days after receipt of the draft audit report to review and comment upon the results and findings thereof by delivering written notice to the Auditor. If TSJ fails to submit written comments to the draft performance audit report within 30 days, TSJ is deemed to have received and reviewed the report without comment. If TSJ objects to the findings in the draft performance report, City, TSJ, and the Auditor shall mutually agree to a procedure for resolving the objection.
- (c) Upon receipt of comments by City and TSJ regarding the results of the draft performance audit report, a final performance audit report (the "Performance Audit Report") shall be issued by the Auditor. Any results of such audit which are based on the same criteria as the Incentive Measures set forth in SECTION 7.4 shall be applied in determining entitlement to the Incentive Fee under SECTION 7.3.
- (d) In addition, at the direction of the City's Director of Finance, the performance audit may include, without limitation, a review and evaluation of internal controls, operating procedures and practices, and financial analysis. The performance audit shall be completed and the Performance Audit Report furnished to City and TSJ within 150 days after the end of each Operating Year. The fees and costs incurred for the performance audit services will be paid from Fund 536.

- 4.12 **Operations Reporting Requirements.** On or before the 20th day following the last day of each calendar quarter, TSJ shall prepare and deliver to City a quarterly report describing the use and operation of the Facilities for the prior calendar quarter in a format containing the information set forth on Schedule 4.12 attached hereto ("Quarterly Report"). The quarterly report will include information on the activities associated with the operation, management, supervision, and maintenance of the Facilities, and shall include a financial analysis (balance sheet, profit and loss statement, cash flow statement, and forecast) of how the Facilities are operating (both on a combined facility basis and on an individual

facility basis), a list of upcoming events (subject to confidentiality limitations of prospective facility users), the operating and maintenance issues and concerns, anticipated changes in operations or maintenance activities, and/or such other information as is appropriate or as requested by City through the Contract Administrator. A copy of the Quarterly Report will be presented to a City Council Committee, as determined by the City Manager, and referred to the City Council for review.

The City retains the right to access all financial records that are presently available and directly related to the operation and management of the Facilities. At the City's reasonable request, the City and TSJ will meet to discuss these reports on a quarterly basis.

SECTION 5. TERM OF AGREEMENT.

- 5.1 **Initial Term.** The initial term of this Agreement commences on the Effective Date and, subject to the provisions of SECTION 6, expires at 11:59 p.m. on June 30, 2019 ("Initial Term").
- 5.2 **Automatic Renewal.** Subject to the provisions of SECTION 6, upon the expiration of the Initial Term, this Agreement shall be automatically renewed for a 5-year term ending June 30, 2024, and, on the expiration of the first renewal, this Agreement shall be automatically renewed for one additional 5-year term ending June 30, 2029 (each an "Additional Term"), with each such renewal based on the same terms and conditions as the Initial Term. In the event of the prior termination of this Agreement under SECTION 6, there shall be no further renewals under this SECTION 5.2.
- 5.3 **Aggregate Term; Fiscal Year.** The aggregate term of this Agreement includes the Initial Term and any Additional Term (the "Operating Term"). Unless otherwise indicated, obligations and performance measures will be determined based on a fiscal year commencing each July 1st and ending on the immediately following June 30th ("Fiscal Year") during the Operating Term.

SECTION 6. TERMINATION.

- 6.1 **Termination for Convenience.** City agrees that this Agreement shall not be terminated for convenience during the first year of the Initial Term and each Additional Term of the Agreement. From and after the first year of the Initial Term or Additional Term, except as otherwise provided in this Agreement, City may, upon the decision of the City Council and upon 180 days written notice, beginning on the second day after mailing, terminate this Agreement in whole or in part. If this Agreement is terminated pursuant to this SECTION 6.1, City shall be liable only for payments required to be made under the terms of this Agreement for services rendered and goods delivered prior to the effective date of termination, including, without limitation, a prorated portion (based on number of days elapsed) of the Incentive Fee calculated on annualized Gross Revenues as determined based on Gross Revenues for the portion of the Operating Year through the effective date of termination.
- 6.2 **Termination for Default.** In the event that City reasonably determines that TSJ

has failed to comply with the material terms of this Agreement in a timely manner ("Default"), City shall notify TSJ in writing of the nature of the Default and of the corrective action to be taken. If corrective action is not commenced within 5 Business Days after receipt of written notice and completed within a reasonable time thereafter, then, subject to compliance with the terms of SECTION 6.6, City may terminate this Agreement by written Notice of Termination to TSJ, which termination shall take effect 90 days after delivery of the Notice of Termination. City further reserves the right to prohibit TSJ from incurring additional obligations during the investigation of any alleged Default and pending corrective action by TSJ or a decision by City to terminate the Agreement.

- 6.3 **Termination for Failure to Meet Performance Measurements.** In the event that the Performance Audit Report described in SECTION 4.11(c) indicates that TSJ has failed to achieve an aggregate Weighted Percentage of at least 80%, calculated as the sum of all of the Weighted Achievement Percentages assigned to each of the Performance Measures for an Operating Year, then, subject to compliance with the terms of SECTION 6.6, City Council may, within 60 days after delivery of the Performance Audit Report for the Operating Year which is the subject of the report, terminate this Agreement upon written Notice of Termination to TSJ, which termination shall take effect 180 days after delivery of the Notice of Termination. For purposes of clarity, and without limitation, the Weighted Percentage is equal to the sum of the Weighted Achievement Percentages for the Economic Impact Measure, plus the Gross Operating Profit Measure, plus the Theater Performance Measure, plus the Customer Services Survey Results Measure.
- 6.4 **Election to Terminate.** Either party may elect to terminate this Agreement on the last day of the Initial Term or Additional Term by providing written notice of termination not less than 180 days prior to the end of the then current term. In the event that both parties fail to deliver written notice of an election to terminate, this Agreement will automatically renew for an Additional Term as provided in SECTION 5.2. Any election by a party not to extend the term of the CVB Agreement will be deemed to be the same election under this Agreement. The automatic renewal of this Agreement shall terminate in the event of (A) the termination of this Agreement prior to the expiration of the Initial Term or any Additional Term pursuant to the terms of this Agreement, or (B) any termination of the CVB Agreement for any reason.
- 6.5 **Concurrent Termination.** In the event that the CVB Agreement is terminated for any reason, TSJ shall have the option to terminate this Agreement upon 180 days written notice to City (the "Termination Option"). TSJ may exercise Termination Option at any time within 90 days after the termination of the CVB Agreement.
- 6.6 **Appeal Process.** In the event that City elects to terminate this Agreement based on City's assessment of its right to do so under SECTION 6.2 or SECTION 6.3, TSJ may appeal the City's decision by submitting the matter to the City Council. The decision of the City Council will be final and binding on the parties. During the period of appeal, the time period following a Notice of Termination as set forth in SECTION 6.2 or SECTION 6.3 will be suspended.

- 6.7 **Consequences of Termination.** In the event of termination, TSJ shall deliver to City copies of all reports, documents, and other work performed by TSJ under this Agreement and, upon receipt thereof, City shall pay TSJ for services performed and reimbursable expenses incurred pursuant to the provisions of this Agreement to the date of termination.
- 6.8 **Termination Procedures.** Upon termination of this Agreement, City, in addition to any other rights provided in this Agreement, may require TSJ to deliver to City any property specifically produced or acquired for the performance of this Agreement. After receipt of a Notice of Termination, TSJ shall:
- (a) Consult with and follow the direction of Contract Administrator to determine when and the manner by which to stop work under the Agreement on the date and to the extent specified in the Notice of Termination;
 - (b) Place only those orders or subcontracts for materials, services, or Facilities as may be necessary to maintain the interests of the City;
 - (c) Assign to City, in the manner, at the times, and to the extent directed by the Contract Administrator, all of the rights, title, and interests of TSJ under this Agreement;
 - (d) Settle all outstanding liabilities and claims (other than ongoing contract obligations) with the approval or ratification of City to the extent City may require, which approval or ratification shall be final for all the purposes of this clause;
 - (e) Transfer to City, and deliver in the manner, at the times, and to the extent directed by City, title to any property which, if the Agreement had been completed, would have been required to be furnished to City; and
 - (f) Take such action as may be necessary, or as City may reasonably direct, for the protection and preservation of the property related to this Agreement which is in the possession of TSJ and in which City has or may acquire an interest.

SECTION 7. COMPENSATION.

- 7.1 **Fixed Management Fee.** City shall pay to TSJ One Million Dollars (\$1,000,000.00) per Operating Year as a "Fixed Management Fee." The Fixed Management Fee is intended to provide, without limitation, for payment of a portion of the expenses incurred by TSJ for the management of the operations and maintenance of the City's Facilities, as determined by the TSJ Board of Directors. The Fixed Management Fee shall be paid in equal quarterly installments during the Operating Year on the first day of each calendar quarter beginning on the Effective Date. In order to assist City in preserving the tax-exempt nature of the bond financing, the Fixed Management Fee and Incentive Fee shall not be considered an Operating Expense and, therefore, will be charged below the Gross Operating Profit line of the Income Statement. Any expenses associated with the compensation of TSJ management that are not

paid with funds available from the Fixed Management Fee shall be considered an Operating Expense and will be charged above the Gross Operating Profit line of the Income Statement. The Fixed Management Fee may be reviewed by City upon the conclusion of the Initial Term or any Additional Term, to determine if any adjustment should be made; provided, however, any adjustment shall be subject to the mutual agreement of TSJ.

- 7.2 **Incentive Fee.** In addition to the Fixed Management Fee, City shall pay to TSJ an annual incentive fee (the "Incentive Fee"). The Incentive Fee is considered a Non-Operating Expense and will be charged below the Gross Operating Profit line of the Income Statement. The Incentive Fee shall be paid within 30 days after the conclusion of the annual performance audit and its acceptance by the City Council.
- 7.3 **Determination of Incentive Fee.** The Incentive Fee payable under SECTION 7.2 shall be determined each year as follows:
- (a) In the event that the aggregate sum of the Weighted Incentive Fee Percentages for all of the Incentive Fee Measures ("Weighted Incentive Fee Score") is equal to 100% or more, TSJ will be paid \$200,000. For purposes of clarity, and without limitation, the Weighted Incentive Fee Score is equal to the sum of the Weighted Incentive Fee Percentage for the Economic Impact Measure, plus the Gross Revenue Measure, plus the Theater Performance Measure, plus the Customer Services Survey Results Measure.
 - (b) Upon conclusion of each Term, the Incentive Fee for the five (5) years of the following Term will increase by \$50,000 for a total of \$250,000 per year for the second Term and \$300,000 per year for the third Term.
- 7.4 **Incentive Fee Measures.** This SECTION 7.4, (a) defines the specific measurements for each of the Incentive Fee Measures described below, (b) establishes the sole criteria under this Agreement by which satisfaction of Incentive Fee Measures will be determined for each Operating Year, and (c) assigns a weighted percentage to each category of Incentive Fee Measure ("Weighted Incentive Fee Percentage") for purposes of determining entitlement to the annual Incentive Fee under SECTION 7.3 of this Agreement. The categories of incentive fee measurement goals by which TSJ's Incentive Fee shall be measured (based on criteria established in the Adopted Operating Budget from year to year) ("Incentive Fee Measures"), and the Weighted Incentive Fee Percentage assigned to each category, shall consist of the items and percentages set forth in this SECTION 7.4. The development of specific performance criteria to be assigned from year to year to each of the components within each of the Incentive Fee Measures shall be the initial responsibility of TSJ in connection with the preparation of the Proposed Operating Budget as set forth in SECTION 9.2(a). The performance criteria with respect to the Incentive Fee Measures for a particular Fiscal Year shall be established by, and as part of, the Adopted Operating Budget. In the event that, during a Fiscal Year, it becomes necessary to make adjustments to the Adopted Operating Budget or the CVB Approved Budget as a result of increased or decreased TOT Revenues of 15% above or below the forecasted amount, the Incentive Fee Measures for the

subject Operating Year may be concurrently adjusted commensurate with the additional or reduced funding. A Weighted Incentive Fee Percentage will be calculated as the product of the extent to which TSJ met the Incentive Fee Measure criteria for the subject Fiscal Year multiplied by the Weighted Incentive Fee Percentage assigned to such Incentive Fee Measure. By way of example, and not by way of limitation, if an Incentive Fee Measure is assigned a Weighted Incentive Fee Percentage of 40%, and it is determined that TSJ met 110% of the incentive criteria for such Incentive Fee Measure, then TSJ would have a Weighted Incentive Fee Percentage of 44% with respect to such Incentive Fee Measure ($40\% \times 110\% = 44\%$). The sum of all of the resulting Weighted Incentive Fee Percentages shall then be determined for purposes of determining satisfaction of the condition to payment of the Incentive Fee under SECTION 7.3. Sample calculations of the Incentive Fee Measure Percentage using a weighted scorecard approach are set forth in Schedule 7.4 to this Agreement. The Incentive Fee Measures and Weighted Incentive Fee Percentages assigned to each are described below:

- (a) **Economic Impact Measures.** This category of Incentive Fee Measure is assigned a Weighted Incentive Fee Percentage of 40%. By managing the strategic mix of business and visitor types, TSJ will focus on total attendance for events and direct spending associated with the Facilities. Components of this Incentive Fee Measure will include measurement of hotel room nights booked and attendance of local, out-of-town, and exhibit visitors. The specific components of this Incentive Fee Measure (each of which will be weighted as shown below) will consist of the following:
 - (i) **Hotel Room Nights.** Measured as (1) the total number of hotel room nights committed by the CVB over the course of the Fiscal Year and (2) the total number of hotel room nights committed that can be directly or indirectly attributed to activities at the Facilities. Hotel Room Nights will be weighted at 15%.
 - (ii) **Attendance.** Attendance will be weighted at 10%. Applying the methodology described on Schedule 4.9(a)(ii), TSJ will measure and report the following visitor types and attendance:
 - (1) **Local/Social visitors.** Attendees who do not require overnight accommodations. For events where there are no hotel room nights attached, all attendees are counted as Local/Social visitors (with the exception of any Exhibitor attendees).
 - (2) **Out of Town visitors.** Attendees who require overnight accommodations.
 - (3) **Exhibitors.** Attendees whose focus is to exhibit products, services, etc., to visitors attending the host event.
 - (iii) **Estimated Economic Impact (EEI).** A measure of direct visitor spending to be conducted based on industry standard multiplier

models mutually agreed upon by TSJ and the City. The components of calculating this measure and the formula for applying the subject components to achieve a numerical result (the "Economic Impact Matrix") will be set forth on Schedule 4.9(a)(iii) attached hereto, as amended from time to time during the Operating Term. Without limiting the generality of the foregoing, the components for calculating this measure shall include sales tax revenues arising from direct spending attributable to convention activity. Notwithstanding the foregoing, it is agreed that, for the first year of the Operating Term, the matrix used by Destination Marketing Association International ("DMAI") will be used to calculate the Economic Impact Matrix. EEI will be weighted at 15%

- (b) **Gross Revenue.** This category of Incentive Fee Measure is assigned a Weighted Incentive Fee Percentage of 40%. As part of City's annual budgeting process and the approval of the Operating Budget, TSJ and City will mutually agree on a target Gross Revenue from the operation of the Facilities. In connection with the process for approving the Operating Budget, and subject to the mutual agreement of the parties, the components of the Sample Income Statement may be modified during the annual budget process, in which event the modified form of Sample Income Statement shall be effective under the Adopted Operating Budget for the subsequent Fiscal Year. The revenue for calculating Gross Revenue will consist of those revenues from operation of the Facilities listed above the "Total Revenue" line of the sample form of income statement included as Schedule 4.9(b) (the "Sample Income Statement"), and will not include revenue billed by TSJ on behalf of other vendors providing services to clients of the Facilities except for the portion of the vendor revenue retained by TSJ. Fund transfers from the CVB Approved Budget shall not be included in Total Revenue. Revenues associated with the Convention Center Parking Garage and Transient Occupancy Tax receipts will not be included in the calculation of net facilities revenue for purposes of measuring the Gross Revenue category of the Incentive Fee Measure.
- (c) **Theater Performance.**
 - (i) This category of Performance Measure is assigned a Weighted Percentage of 10% and will measure both "activation" of the Theaters and overall "utilization" of the Theaters. Activation of the Theaters will be measured by the extent to which TSJ maintains or increases use of the Theaters with respect to "Performances," and utilization of the theaters will be measured by the extent to which the TSJ maintains or increases the use of the Theaters with respect to "Special Events" during the Fiscal Year.
 - (ii) In assessing activation and utilization, it is agreed that the number of Performances and Special Events will be measured against, and as a percentage of, Available Use Days (defined as calendar days during the Fiscal Year that are both available and suitable for

booking of Performances and Special Events), it being understood and agreed that all calendar days are not necessarily marketable for performance of public or private events. TSJ and City shall determine the number of Available Use Days for an upcoming Fiscal Year during the budget process, and shall adjust Available Use Days during the year based on circumstances. For example, and without limitation, if a Facility is damaged due to an unforeseen event and is, as a consequence, temporarily not available for Performances and/or Special Events, then the number of Available Use Days for that Facility will be reduced by the number of days that the Facility is unavailable during the period of repair.

(iii) For purposes of measuring activation of the Theaters and satisfaction of the Theater Performance category of Performance Measures, if a Resident Arts Partner or Bay Area Non-Profit reserves the use of a Theater and subsequently cancels one or more days of reserved use within ninety (90) days prior to the scheduled event, then the number of cancelled days reserved to such use will be treated as if they were actually used.

(iv) For purposes of this Agreement, "Performances" means and includes, without limitation, scheduled dances, theatrical, sports, musical, comedy, speaker series, or other cultural performances or events that are generally available for general public attendance, whether or not tickets are issued with respect thereto. For the further purposes of this Agreement, "Special Events" means private events that are not open to the general public. "Performances" shall be weighted at 5%, representing one-half of the total theater Performance weighted measure of 10%. "Special Events" means all days that a Theater is utilized under contract for a private event. "Special Events" shall be weighted at 5%, representing one-half of the total theater Performance weighted measure of 10%. In the event that multiple Performances and/or Special Events occur in a single Facility during a single day, each such Performance and/or Special Event shall be counted in determining activation and utilization of the Facilities.

(d) **Customer Service Survey Results.** This category of Incentive Fee Measure is assigned a Weighted Incentive Fee Percentage of 10%. TSJ will ask the decision maker of each event to rate their overall satisfaction with the product and services provided. TSJ will create a standard survey instrument containing a series of product and service rating metrics, including the following summary question: "Based on the services provided, please rate our overall performance." The post facility use survey data will be sent directly to the Contract Administrator for review. In addition, TSJ will work on developing an attendee survey to be distributed to convention attendees, subject to approval of the convention sponsor and available funding. The attendee survey will not form a basis for assessing TSJ's performance with respect to this Performance

Measure. Periodically, Contract Administrator and TSJ shall review and discuss the survey data and identify, as necessary, areas for additional TSJ attention and improvement.

SECTION 8. OWNERSHIP; USE OF FACILITY.

8.1 Ownership of Facility, Data, Equipment, and Materials.

- (a) Except as otherwise expressly provided herein, City will retain ownership of the Facilities, including, but not limited to, all real estate, technical and other equipment, furniture, displays, fixtures and similar property, including any improvements made during the Operating Term or any renewal period. Ownership of assets purchased from the Operating Account or any other City funds is and shall remain with City. City shall own all data and other electronic files generated by TSJ through the use of either City's or TSJ's data processing programs and software in operating the Facilities. No property rights described in this SECTION 8.1 will accrue to TSJ.
- (b) Any and all writings, documents, software, and source codes prepared or developed by TSJ pursuant to this Agreement are the property of City at the time of preparation, and shall be turned over to City upon expiration or termination of this Agreement. TSJ grants City a copyright license to use such writings, documents, software, and source codes. TSJ shall not permit the reproduction or use thereof by any other person, except as otherwise expressly provided in this Agreement. TSJ agrees to execute any documentation reasonably requested by City through the Contract Administrator from time to time to establish, protect, or convey any intellectual property rights in such writings, documents, software, and source codes hereunder.
- (c) TSJ may not take and or use, for its own purposes, any customer or exhibit lists or similar materials developed by City (including through TSJ in its performance under this Agreement) for the use of any Facility unless written consent is granted by City.
- (d) TSJ shall have no authority to sell or otherwise dispose of any personal or real property owned or leased by City without the prior written approval of City.
- (e) Except as otherwise provided in this Agreement, TSJ assumes the risk of, and shall be responsible for, any loss or damage to any equipment or other property delivered to it by the City for use by TSJ when providing services at the Facilities. Upon the expiration or earlier termination of this Agreement, TSJ shall return any such equipment or property to the City in the condition in which TSJ received it, except for reasonable wear and tear.
- (f) TSJ shall own all property acquired by TSJ with funds from the Management Fee or the Incentive Fee, or from interest earned on such funds.

8.2 **Right to Use.** City hereby grants TSJ the exclusive right and license (including exclusive as to City, but revocable by City in accordance with SECTION 6 above) to use the Facilities, and TSJ accepts such right of use and accepts the Facilities "AS IS" for the purpose of performing the services herein specified, including the operation and maintenance of all physical and mechanical facilities and equipment necessary for, and related to, the operation, maintenance, and management of the Facilities. Pursuant to such license, City will provide TSJ with a sufficient amount of suitable office space in one or more of the Facilities, and with such office equipment as is reasonably necessary, to enable TSJ to perform its obligations under this Agreement. In the event of the declaration of emergency by City, TSJ shall cooperate with City's requests for use of the Facilities on a temporary basis subject to the protocols and procedures set forth on EXHIBIT C attached hereto.

8.3 **Compliance with Agreements and Subordination.**

- (a) City agrees to pay, keep, observe, and perform all payments, terms, covenants, conditions and obligations under any Bonds, debentures, loans, and other financing and security agreements (collectively, the "Debt Instruments") to which City is bound, or may in the future be bound, in connection with its ownership or lease of the Facilities. TSJ agrees that it shall not knowingly take any action that would cause or constitute a breach by City under any of the Debt Instruments.
- (b) This Agreement is subject and subordinate to all of the Debt Instruments which may now or at any time hereafter affect the Facilities in whole or in part; provided, however, City shall have delivered a copy of the Debt Instruments to TSJ and, if the terms of the Debt Instruments materially increase TSJ's obligations hereunder, or materially decrease TSJ's rights or economic benefits hereunder, TSJ shall have the right to terminate this Agreement on 90 days written notice delivered to City within 30 days after first receiving a copy of any new Debt Instrument. This clause shall be self-operating, and no further instrument of subordination shall be required. In confirmation thereof, upon City's request through the Contract Administrator, and subject to TSJ's right to terminate this Agreement, TSJ agrees to promptly execute such further assurances and documents as may be reasonably required by City or any beneficiary or holder of any such Debt Instruments. Notwithstanding the foregoing, if required by City, or any such beneficiary or holder, TSJ shall execute, upon demand of City or any such beneficiary or holder, subordination instruments to such Debt Instruments.
- (c) TSJ agrees to perform, discharge and comply with the obligations of City expressly set forth in the continuing contracts relating to the Facilities of which TSJ has been advised, in each case effective from and after the Effective Date. TSJ further agrees to perform, discharge, and comply with all obligations under any agreements which TSJ is authorized to enter into in connection with its management of the Facilities as expressly provided in this Agreement, subject to the terms of SECTION 8.4 below. TSJ shall provide City with copies of or access to any and all such continuing contracts, subject to redacting any information identifying a

user of the Facilities to the extent required by the subject agreement or contract.

8.4 Bond Financing. TSJ acknowledges that the Convention Center, the Civic Auditorium, and the California Theatre are financed in large part with the proceeds of one or more series of bonds ("Bonds") the interest on which is intended to be excluded from gross income for federal income tax purposes. In order to assist City in preserving the tax-exempt nature of the Bonds, TSJ acknowledges and agrees that, with respect to its operation of the Convention Center, the Civic Auditorium, and the California Theatre, and for so long as any such Bonds are outstanding with respect to a herein listed Facility, TSJ will adhere to the obligations contained in this SECTION 8.4 with respect to such Facility.

- (a) In determining whether to grant or withhold any approval of any contract for which approval of City is required under this Agreement, City will consider the effect of such contract for federal tax purposes on the exclusion of interest on the Bonds for federal income tax purposes.
- (b) Any contract for the provision of management services related to the Convention Center, the Civic Auditorium, or California Theatre must, to the extent applicable, comply with the provisions of Revenue Procedure 97-13 (as modified by Revenue Procedure 2001-39) and any modifications thereto or interpretations thereof.
- (c) In addition to any other contracts requiring the approval of City, each of the following described contracts must be approved by City before execution thereof by TSJ:
 - (i) Any contract relating to the Convention Center, Civic Auditorium, or California Theatre which grants a leasehold interest, term for years, or other real estate interest in the Convention Center, Civic Auditorium, or California Theatre (other than a revocable license), or grants a long-term right to use the Convention Center, Civic Auditorium, or California Theatre on a basis different from that of the general public.
 - (ii) Any contract for the use of the Convention Center, Civic Auditorium, or California Theatre for shows, programs, conventions, and other events, except (a) where such contracts provide for use on a fixed fee basis (excluding the sale of merchandise or concessions in respect thereto which may be on a percentage of merchandise or concession revenues), or (b) are determined on an event-by-event basis, and where the right of the user to the Convention Center, Civic Auditorium, or California Theatre are those of a transient occupant rather than full legal possessory interest in the Convention Center, Civic Auditorium, or California Theatre as a lessee.
- (d) If required by bond counsel to City, TSJ agrees to make necessary modifications to this Agreement so that, in the opinion of such counsel and TSJ's selected bond counsel, the subject agreement is a qualified

management contract for purposes of Revenue Procedure 97-13 promulgated by the Internal Revenue Service. In the event such modifications materially increase TSJ's obligations hereunder, or materially decrease TSJ's rights or economic benefits hereunder, TSJ and City will cooperate with each other in good faith for a period of 30 days in an effort to amend the Agreement and preserve the economic benefits of both parties hereunder in a manner that is satisfactory to TSJ, City, City's bond counsel, and TSJ's bond counsel, each acting in their sole discretion. To the extent the parties do not amend this Agreement within such 30-day period, TSJ shall have the right to terminate this Agreement upon not less than 90 days prior written notice to City, which right may be exercised by TSJ providing such termination notice to City within 20 business days after expiration of the 30-day negotiation period. If TSJ timely exercises its right of termination under this SECTION 8.4(d), TSJ shall continue to perform its obligations hereunder through the date of termination and City shall continue to pay TSJ all Management Fees, on a prorated basis, for the then current Operating Year, through the date of termination in accordance with this Agreement.

8.5 City Use and Economic Development

- (a) City has the right to use the Facilities for meetings, seminars, conferences or receptions from time to time ("City Event"), subject to availability and payment of Facility rates, based on an amount to be determined through the City's annual budget process ("City Use Funding").
- (b) City may also allocate City Use Funding to support activities and events ("Economic Development Event") at the Facilities that align with the City's economic development goals, based on an amount to be determined through the City's annual budget process.
- (c) City and TSJ shall mutually agree on City Event use and Economic Development Event use in accordance with the procedures set forth in the booking guidelines established by TSJ from time to time.
- (d) With respect to the outdoor area immediately surrounding the CPA, the following will apply:
 - (i) Use of the CPA Grounds for the outdoor event must be scheduled through TSJ and may not conflict with any existing contracted bookings at the CPA.
 - (ii) Responsibility for maintaining the CPA Grounds throughout the outdoor event and the post event clean-up of the CPA Grounds shall be the responsibility of the event organizer.
- (e) Except with respect to an Economic Development Event approved by City, the City Use Funding appropriation shall be charged for City Department initiated and managed events, whether or not fees are charged to attendees. Except in the case of an Economic Development

Event, if admission is charged for the event, all net revenues must be returned to the City after expenses are paid. The person coordinating the event must be a City Department staff person and must be on-site during the event.

- (f) City Event use of the Facilities is limited to meetings with 50 or more attendees. Exceptions will be made for testing and other special needs.
- (g) The City Event use request must be approved by the requesting City Manager designee.
- (h) Charges for City Event or Economic Development Event use are limited to base room rental fees and other ancillary charges.
- (i) Event set-up information must be submitted to the appropriate event coordinator no less than 20 days prior to the first event day. Administrative fees for event coordination and appropriate labor fees for set-up charges will be charged to the City Department when set-up information and/or changes to the set-up information are received less than 20 days prior to the first event day.
- (j) If an event is canceled after a City Use Agreement has been finalized, a cancellation fee equivalent to the base rental fee will be charged to the City Department that reserved the use.
- (k) If, more than six (6) months prior to a City Event or Economic Development Event, TSJ receives a *bona fide* proposal from a third party to license the Facility space during all or a portion of the occupation term reserved for a City Event or Economic Development Event, TSJ, in consultation with the City, may elect to relocate the City Event or Economic Development Event to one or more Facilities that are part of the City of San Jose convention facilities and license the use of the impacted Facilities to the third party.
- (l) If, within six (6) months prior to a City Event or Economic Development Event, TSJ receives a *bona fide* proposal from a third party for a High Impact Use (as defined below) to license the Facility space during all or a portion of the occupation term reserved for a City Event or Economic Development Event, TSJ, upon mutual agreement with the City, may elect to relocate the City Event or Economic Development Event to one or more other Facilities that are part of the City of San Jose convention facilities and license the use of the impacted Facilities to the third party for the High Impact Use. If a signed City Use Agreement or Facility Use Agreement has been delivered prior to the above notice, then TSJ will reimburse the City or Economic Development Event user for any actual costs and expenses incurred directly and exclusively as a result of the relocation of the event to another facility. For purposes of this Agreement, a "High Impact Use" is an event that represents a commitment to use a minimum of either (A) 2,000 room nights mid-week or (B) 1,000 hotel room nights during the weekend (or both).

- (m) Departments and event organizers using City Use Funding are exempt from receiving a customer survey.
- (n) City Use Funding shall be applied to payment of the event invoice and the revenues shall be treated the same as revenue from any third party user of the Facilities and included when determining satisfaction of Performance Measures and entitlement to an Incentive Fee.

SECTION 9. FACILITY OPERATING BUDGET.

9.1 **Initial Operating Budget.** The 2014-2015 Adopted Operating Budget will constitute the Adopted Operating Budget for the first year of the Term of this Agreement, a copy of which will be attached hereto as EXHIBIT F upon approval in accordance with the provisions of SECTION 9.2.

9.2 Establishment of Operating Budget.

- (a) TSJ shall submit to the City, on or before February 1st of each Operating Year (unless otherwise indicated), a proposed operating budget (the "Proposed Operating Budget") which shall address each of the Performance Measures and Incentive Fee Measures, and shall include revenue and estimated Transient Occupancy Tax transfer needed from Fund 536 to support operations. The City will review the Proposed Operating Budget and, during the period between February 1st and March 1st, City and TSJ will work toward developing a final Proposed Operating Budget. The Proposed Operating Budget will address each of the following:
 - (i) Property operation and maintenance;
 - (ii) Furnishings, fixtures, and equipment purchases and replacement and repair;
 - (iii) Major City economic driven events and the associated budget and performance impacts and event costs (See Schedule 9.2(a)(iii));
 - (iv) Economic driven and financial performance measures, theater and customer service measures; and
 - (v) Amount of Transient Occupancy Tax funding needed to support TSJ's convention and facility operations.
- (b) In addition to the foregoing items, TSJ shall provide the following separate reports with the Proposed Operating Budget (each of which shall support such Proposed Operating Budget):
 - (i) Individual Facility budgets, including revenue estimates from secured and potential clients;
 - (ii) Cash flow forecasts by month for the full Operating Year; and
 - (iii) A summary income statement.

- (c) TSJ shall prepare each Proposed Operating Budget with appropriate diligence and after giving due consideration to all relevant factors affecting the operation of the Facilities, including, without limitation, reasonably anticipated market and economic conditions applicable to the Operating Year and operation of the Facilities in accordance with the terms of this Agreement. The Proposed Operating Budget shall be subject to the approval in writing by the City, and the City hereby agrees to examine each Proposed Operating Budget submitted to it. If found reasonable and proper, the City will approve in writing such Proposed Operating Budget, it being contemplated that the Proposed Operating Budget will be agreed upon by the parties hereto and approved by the City Council on or before June 30th of the Operating Year during which said Proposed Operating Budget is submitted. If City fails to either approve the Proposed Operating Budget on or before June 30th of the Operating Year during which said Proposed Operating Budget is submitted, or fails to submit its objections thereto to TSJ within such period, then the City shall be deemed to have approved the same. If the City objects in the manner provided above to any such Proposed Operating Budget submitted by TSJ, City and TSJ shall then attempt to mutually agree upon a Proposed Operating Budget satisfactory to both City and TSJ, and if the City and TSJ are not able to mutually agree thereto, either:
- (i) TSJ may agree to operate under the terms of the operating budget counter-proposed by the City;
 - (ii) TSJ can invoke the dispute resolution process in SECTION 18; or
 - (iii) TSJ may, at its option, terminate this Agreement upon 180 days' notice to the City.
- (d) The Proposed Operating Budget, as approved by City and TSJ, shall then be submitted to the City Council for approval. Once approved, the Proposed Operating Budget shall become the "Adopted Operating Budget," and such Adopted Operating Budget shall provide the sole criteria for establishing the Performance Measures and Incentive Fee Measures for the Operating Year which is the subject of such Adopted Operating Budget. In the event that the Proposed Operating Budget is not approved by the City Council, TSJ shall have the options set forth in SECTION 9.2(c)(i) through (iii), inclusive.

SECTION 10. PROCEDURE FOR HANDLING INCOME AND EXPENSES.

- 10.1 **Receipts Accounts.** TSJ is authorized to invoice customers for products sold and services rendered. Revenues from operations of the Facilities will be recognized and recorded in accordance with GAAP. TSJ shall deposit all of the receipts from the operation of the Facilities in an account established by City and maintained by TSJ for the benefit of City (the "Receipts Account"). In addition, any Fund 536 Transfer required pursuant to SECTION 10.4 below shall be transferred from Fund 536 and deposited into the Receipts Account. TSJ is authorized to transfer funds from the Receipts Account to the Operating Account

from time to time as TSJ determines in its reasonable judgment to be necessary for payment of operating expenses, management fees, and disbursements, and make transfers from the Operating Account to the City as provided in SECTION 10.2. Any Operating Subsidy required pursuant to SECTION 10.5 will be transferred from City Accounts to Receipts Account by the City's Director of Finance. For the purpose of securing City's interest in this Agreement, the Receipts Account shall be the property of City and shall be used exclusively in connection with the operation of the Facilities and the performance of the terms and conditions with the operation of the Facilities under this Agreement. TSJ shall receive, hold, manage and disperse the funds in the Receipts Account in trust for the City, and agrees to provide daily records of deposit(s), with necessary documentation and revenue account coding to City's Director of Finance, as requested, in the format and media necessary to post to City's revenue, receipts, banking and accounting systems as determined from time to time by City's Director of Finance. All transactions initiated by City's Director of Finance shall be timely reported to TSJ.

- 10.2 **Operating Account.** TSJ will utilize an existing bank account ("Operating Account"), to provide for the deposit of transfers from the Receipts Account. The Operating Account shall provide for the provision of withdrawal of funds for payment of operating expenses, management fees, and disbursements from said account. Such Operating Account will be segregated from all other activities of TSJ, and shall be used exclusively in connection with the operation of the Facilities and the performance of the terms and conditions of this Agreement. Checks or other documents of withdrawal drawn upon the Operating Account or other accounts shall be signed by representatives of TSJ or employees of the Facilities designated by TSJ, which persons drawing on such accounts shall be bonded or otherwise insured. For the purpose of securing City's interest in this Agreement, the Operating Account shall be the property of City and shall be used exclusively in connection with the operation of the Facilities and the performance of the terms and conditions of this Agreement. TSJ shall receive, hold, manage, and disperse the funds in the Operating Account as a custodian for the City, and agrees to segregate all receipts, accounts and records pertaining to the operation of the Facilities from all other business conducted by TSJ.
- 10.3 **Reimbursements to City.** All costs identified in the Adopted Operating Budget for City's monitoring and oversight of the Facilities and this Agreement will be funded by City and charged to Fund 536. All other costs associated with the operation of the Facilities and this Agreement that are identified in the Adopted Operating Budget and paid by City will be subject to reimbursement and related bank transfer as determined by City's Director of Finance. TSJ will be notified in advance by the City's Director of Finance of the amount of transfers and related detailed charges to properly account for the associated Facilities accounting records.

10.4 **Fund 536.**

- (a) City acknowledges that it collects a transient occupancy tax that is allocated to the City's TOT Fund ("TOT Revenues"). City shall transfer from TOT Revenues an amount equal to the entire operating subsidy allocated the Convention and Cultural Facilities, as determined under Section B.3. of San Jose City Ordinance 23481 ("TOT Transfer"), to a City fund dedicated to funding the operation, maintenance and capital expenses of the Facilities ("Fund 536"). The City reserves the right to amend the budgeted revenue estimate throughout the course of the year based on actual transient occupancy tax collections. In the event that transient occupancy tax collections during the course of the Fiscal Year decline significantly from budgeted estimates, the transfer from the TOT Fund to Fund 536 will be reduced accordingly, which may also require modification of the budgeted revenue estimate set forth in the Adopted Operating Budget. A reconciliation of actual transient occupancy tax collections and transfers into Fund 536 will be completed at the end of each Fiscal Year, and any variance in collections from the budgeted estimate will be distributed according to the TOT distribution formula.
- (b) The funds allocated to Fund 536 shall be used, in part, to fund Operating Expenses in excess of the Operating Revenues ("Operating Deficiencies") and Capital Improvement costs. In order to maintain the Operating Cash Balance Threshold from time to time and, subject to SECTION 10.8, to pay expenses of Capital Improvements and cover Operating Deficiencies, City and TSJ shall, during the budget process, estimate the amount of the TOT transfer from Fund 536 that will be required during the Fiscal Year covered by the Adopted Operating Budget (the "Fund 536 Transfer"). Provided that City determines that sufficient revenues have been transferred into Fund 536 from the TOT Fund, the Fund 536 Transfer will occur in four installments on or about: July 1, September 1, December 1, and April 1 each in an amount equal to the budgeted Operating Deficiencies for that installment period. In the event that Operating Revenues for any quarter are insufficient to pay Operating Expenses for such quarter, or in the event of an anticipated decrease in the balance of the Operating Account below the Operating Cash Balance Threshold, City is authorized to revise the schedule of the Fund 536 Transfer and the allocation of the amount of each separate transfer. During the course of the year, should the City determine that, in coordination with TSJ, Operating Deficiencies are anticipated to be lower than the Adopted Budget, City is authorized to reduce the Fund 536 Transfer and, if necessary, withdraw from the Receipts Account the difference between the original Fund 536 Transfer and the revised Fund 536 Transfer.

- 10.5 **Operating Subsidy.** From time to time the amount of Operating Revenue deposits and Fund 536 Transfers into the Operating Account may be insufficient to pay Operating Expenses. In the event that Operating Revenues, Fund 536 Transfers, and cost containment strategies, are not sufficient in any month during the Operating Term to maintain the Operating Cash Balance Threshold or to fund a deficiency in the Operating Revenue over Operating Expenses, City may

facilitate a transfer of a subsidy from the City General Fund into the Receipts Account ("Subsidy"). The Subsidy transfers shall be made by the City's Director of Finance on or before the 15th day of each month. It is the intention of the parties that any Subsidy transfer will be repaid to the City General Fund from future Available Operating Revenues of the Facilities, if any, at the interest rate earned from time to time on City's short-term General Fund deposits; provided, however, TSJ has no liability or obligation with respect to repayment of the Subsidy transfer.

- 10.6 **Operating Account Balance.** TSJ shall furnish the City monthly statements showing the cash balance in the Operating Account, a monthly bank account reconciliation of the Operating Account, and the cash forecast for the following month, no later than 7 days prior to the end of each calendar month. In addition to the monthly reports, TSJ shall provide City with a 3rd Quarter Report which is a thorough analysis of TSJ actual spending to date and projected spending for the last 3 months of the then current Fiscal Year, compared to the budget appropriation, and present any needed adjustments. Additionally, TSJ's Board of Directors shall notify the City in advance of non-budgeted or change in the normal course of business decisions likely to result in a fiscal impact of \$250,000 or greater; and for any contractual obligations lasting 1 year or longer, that exceed \$100,000 per year. Based on such reports, the City's Director of Finance shall fund the Operating Subsidy described in SECTION 10.5 in an amount sufficient to maintain, during the next calendar month, a minimum balance in the Operating Account of not less than the Operating Cash Balance Threshold amount then in effect. The Operating Cash Balance Threshold may be modified from time to time based on the anticipated requirements of operations on the mutual agreement of City and TSJ.
- 10.7 **Approved Annual Budget Compliance and Modification.** TSJ shall, with written notice to City, be entitled to modify the Adopted Operating Budget to respond to unanticipated increases or decreases in Gross Revenues or Operating Expenditures. Notwithstanding the foregoing, TSJ shall not modify the Adopted Operating Budget in such a manner that would result in an increase to the Fund 536 Transfer without written authorization from City. The City may, in coordination with TSJ, be entitled to reduce the Fund 536 Transfer as referenced in Section 10.4(b). City Council approval is required for any increase in anticipated Operating Expenses that would result in the need for a Fund 536 Transfer in excess of the amount budgeted in Fund 536.
- 10.8 **Reserves.** To set aside funding for specific purposes in the future, or for unforeseen circumstances, the City shall maintain various reserves in Fund 536, as follows:
- (a) Capital Improvement Reserve. Annually through the Operating Term of this Agreement, the City shall allocate resources in Fund 536 to a reserve (the "Capital Improvement Reserve") for City-approved Capital Improvement and Repairs. This allocation will only be made if there are sufficient uncommitted funds available in Fund 536 and there is no need to provide additional fiscal support for any of the following:
 - (i) Funding of anticipated operating deficits;

- (ii) Expenditures for active capital improvement projects or emergency repairs;
 - (iii) Adequate Fund 536 unrestricted fund balance for cash flow and unforeseen circumstances; and
 - (iv) To the extent permissible, covering any debt service shortfall in the event that special tax revenues and the balance in the special tax revenue fund are insufficient to pay debt service obligations of the debt/bonds to support the Convention Center expansion.
- (b) Revenue Stabilization Reserve. Annually through the Operating Term, the City shall maintain a reserve (the "Revenue Stabilization Reserve") in Fund 536 to be utilized in the event of lower than anticipated TOT collections and subsequent transfers to Fund 536 from the TOT Fund during a given year. The amount of the reserve will be determined by the City in coordination with TSJ.
- (c) Other Reserves. The City may from time to time and in coordination with TSJ establish other reserves within Fund 536 for various purposes related to the Facilities.

10.9 **Operating Account Audit.** In addition to the audit rights under SECTION 31, City may conduct one or more audits of the books and records of TSJ relating to the Operating Account (including, without limitation, all Operating Revenues and Operating Expenses related thereto) (the "Operating Account Audit"). The Operating Account Audit may be conducted up to two times per Operating Year, at the discretion of City's Director of Finance, upon 10 business days advance written notice to TSJ, and shall be performed by the External Auditor. Costs for the Operating Account Audit will be paid by TSJ from the Operating Account and will be allocated as operating cost of the Facilities; provided, however, such costs shall be recorded below the line of Gross Operating Profit.

SECTION 11. FISCAL RESPONSIBILITY.

11.1 **City Services.** City will continue to provide (or make available to TSJ's use, if beneficial to the Adopted Operating Budget) those goods and services, at the option of TSJ, that are expressly to remain the responsibility of City as contained within the Adopted Operating Budget. In no event shall such goods and services include those that are deemed to be the responsibility of TSJ as stated in this Agreement. TSJ may exercise its option herein upon 90 days' notice to City.

11.2 Taxes and Assessments.

- (a) Payment of Taxes, Fees. Generally, TSJ shall be responsible for payment of all taxes, fees, contributions, and charges applicable to the conduct of TSJ's business during the Operating Term; provided, however, all taxes that are related to the fixed assets are to be paid as set forth in SECTION 11.2(b).

- (b) Possessory Interest Tax. It is the understanding of the City and TSJ that no interest in the Facilities property or structures is created by this Agreement. It is further acknowledged and agreed that the sole purpose of this Agreement is for TSJ to provide operation management services. Nevertheless, TSJ recognizes and agrees that the assessor for the County of Santa Clara may determine that TSJ's right to operate and manage the Facilities as set forth in this Agreement creates a possessory interest subject to a possessory interest tax. In the event that possessory interest taxes are assessed, City shall reimburse TSJ for any possessory interest tax or taxes imposed upon TSJ as a result of its operation and management of the Facilities, and the amount of such reimbursement shall not be allocated to any of the financial formulas or results of operation under this Agreement.
- (c) Income Taxes. TSJ shall timely pay all state, federal and local income taxes arising from TSJ's Management Fees and Incentive Fees actually received by TSJ under this Agreement. TSJ is not responsible for, and City shall indemnify and hold TSJ harmless from, any tax liabilities arising from the Operating Revenues of the Facilities.
- (d) Tax – Hold Harmless. Except as set forth in Subsection 11.2(b), TSJ shall protect, defend, indemnify and hold City, including the Facilities, and any improvements now or hereafter in the Facilities, free and harmless from any liability, loss, or damage resulting from any taxes, assessments, or other charges required by this Agreement to be paid by TSJ, and from all interests, penalties, and other sums imposed thereon and from any proceedings to enforce collection of any such taxes, assessments, or other charges. During the term of this Agreement and any renewals thereof, TSJ shall pay the applicable San José Business Taxes required by Chapter 4.76 of the San José Municipal Code.

11.3 Internal Control Structure. TSJ shall maintain an internal control structure designed to provide assurance that the Facilities are safeguarded from loss or unauthorized use, that transactions are executed in accordance with this Agreement, and that the financial records are reliable for the purpose of preparing financial statements. The internal control structure shall be supported by the selection, training, and development of qualified personnel, by an appropriate segregation of duties, and by the dissemination of written policies and procedures. City's Director of Finance, or designee, may review such controls at any time during this Agreement, and may commission an agreed upon procedures audit from the External Auditor. TSJ agrees to be cooperative and to provide any information relevant to the review of Director of Finance, City's Internal Auditor, and the External Auditor.

11.4 Duty to Keep City Informed. TSJ shall keep City's Director of Finance and/or Contract Administrator informed and advised of all material financial and other matters concerning the Facilities and the operation thereof, and give due consideration to suggestions which City's designees or consultants may offer with respect thereto from time to time.

- 11.5 **Covenant of TSJ Regarding Notes/Guarantees/Loan Agreements.** TSJ covenants and agrees that it will not, and nothing herein shall be deemed to authorize TSJ to, execute any notes, guarantees, loan agreements or other evidences of indebtedness, or borrow any money on behalf of the City or the Facilities or as a part of the Operating Expenses herein authorized. It is also expressly understood and agreed that TSJ has no power or authority to enter into any mortgage, deed of trust, security agreement, or any other instrument (other than for the licensing of the use of the Facilities expressly authorized herein) encumbering all or any part of the Facilities or any accounts or other personal property arising from or attributable to the Facilities or its operations. This paragraph shall not prohibit TSJ from incurring indebtedness on behalf of the City to suppliers of goods and services to the Facilities which are required in the operation of the Facilities in the ordinary course of business and in conformity with the customs and business practices of the industry and the terms of this Agreement, or from entering into agreements and instruments in connection therewith.

SECTION 12. CAPITAL IMPROVEMENTS AND REPAIRS.

- 12.1 **Capital Improvement Program.** On or before February 1st of each Operating Year (unless otherwise indicated), TSJ shall submit to the Contract Administrator (1) a building system condition assessment report of each of the Facilities, (2) a proposed list of Capital Improvements and Repairs which TSJ recommends to be undertaken at each of the Facilities during the next five-year period, and (3) a recommended budget and priority order for completing the Capital Improvements and Repairs (collectively the "Capital Improvement Program Report"). TSJ's report of a conceptual budget, that will include the estimated costs of design, materials, construction, inspection, and the proposed contingency for each identified Capital Improvement and/or Repair, shall be based on TSJ's knowledge of the Facilities and related construction costs, TSJ's knowledge of revenue-enhancing strategies, and TSJ's role in maintaining the quality of the Facilities; provided, however, the recommended budget for the identified Capital Improvements and Repairs shall not exceed the funding available in the Capital Improvement Reserve or other appropriations in Fund 536 eligible to fund capital improvements. TSJ shall not obtain nor be required to obtain any bids in connection with its preparation of the Capital Improvement Program Report. The final Capital Improvement Program Report will be submitted to City for approval on or before March 1st of each Operating Year as part of the City's annual budget process. City's approval of the annual Capital Improvement Program Report will be conceptual only, and implementation of any portion of the recommendations set forth in the Capital Improvement Program Report will be subject to the availability of funds in the Capital Improvement Reserve, other sources in Fund 536, and Contract Administrator approval. Neither party shall be required by the other to make additional deposits to the Capital Improvement Reserve or pay for budgeted items from its separate funds without such party's prior written consent, which consent may be granted or withheld in such party's sole and absolute discretion. The budget recommended by TSJ as set forth in the Capital Improvement Program Report, as and when approved by City, shall become the Capital Budget for the Facilities for the Operating Year immediately following City approval. Other than Emergency Capital Repairs and Replacements, TSJ may not make any Capital Improvements or Repairs that are outside of the Adopted

Operating Budget, are not included in the Capital Budget, or not otherwise approved in advance by City in writing.

- 12.2 **Convention Center Capital Facilities Advisory Committee.** In addition to the requirements provided in SECTION 12.1, a Capital Facilities Advisory Committee shall be formed. The Capital Facilities Advisory Committee will consist of 4 members from the hotel industry to be selected by TSJ and 4 members from the City to be selected by City. The purpose of the Capital Facilities Advisory Committee will be to (1) develop a long term capital maintenance strategy for the Convention Center, (2) provide the initial revise of the specific projects proposed in the annual Capital Improvement Program Report, and (3) approve capital project recommendations to be submitted by TSJ to be further developed for final budget consideration by City; provided, however, the scope of the Capital Facilities Advisory Committee's activities and recommendations will be limited to the use and application of funds available from the Convention Center Facility District.
- 12.3 **Unanticipated Capital Repairs and Replacements.** In the event that TSJ becomes aware of the need for a capital repair or replacement that was not anticipated, but is necessary for the continued operation of any of the Facilities, TSJ shall immediately notify the Contract Administrator of the nature of the repair or replacement and of the estimated cost of the repair or replacement. The Contract Administrator will make a recommendation to the City on how to proceed within 30 days of the request from TSJ. The City will authorize TSJ to perform the repair or replacement. If TSJ performs the repair or replacement, the line item in the Adopted Annual Budget for Capital Improvements and Repairs will be increased by the cost thereof.
- 12.4 **Emergency Capital Repairs and Replacements.** City may make Emergency Capital Repairs and Replacements consistent with established City procedures for handling civil emergencies. City shall provide TSJ with the names and telephone numbers of the City Manager's Office to contact in the event of an emergency involving the Facilities or a Facility. If TSJ reasonably determines that any delay would present a material risk to human life or the structural integrity of one or more of the Facilities, or would prevent the holding of a scheduled event, TSJ may immediately commence Emergency Capital Repairs and Replacements. In all other events, TSJ shall notify the City Manager's Office at the emergency number provided to TSJ, and shall either receive the City's prior approval or wait 48 hours without receiving a response before commencing Emergency Capital Repairs and Replacements. In the event that TSJ performs the Emergency Capital Repair or Replacement, the line item in the Adopted Operating Budget for capital improvements will be increased by the cost thereof.
- 12.5 **Funding of Capital Items.**
- (a) Costs of Capital Improvements and Repairs, and Emergency Capital Repairs and Replacements as described above in excess of the amount budgeted in Fund 536 shall be paid from, and to the extent of, available Facility operating revenues; provided, however, TSJ shall be entitled to recover amounts advanced by TSJ, if any, from future deposits that would have otherwise been directed into the Capital Improvement Reserve.

Neither City nor TSJ shall have any responsibility for costs of Capital Improvements and Repairs, Parking Capital Repairs and Replacements, or Emergency Capital Repairs and Replacements except as included in the Capital Budget or those otherwise agreed to in writing by City.

- (b) TSJ, at its sole cost and expense, shall provide reasonable periodic (not less often than quarterly) accounting of the project accounts to City.

12.6 Implementation of Work. TSJ shall implement the design and construction of Capital Improvements and Repairs only after the Capital Improvement Program Report and Capital Budget have been approved. TSJ shall exercise its supervisory responsibilities with respect to Capital Improvements and Repairs with the objective that all work and materials shall be of the highest quality appropriate to the uses for which such improvements and materials are intended, and as are reasonably consistent with the nature of the improvements and the amount budgeted therefore.

To the extent that TSJ advances payments for the cost of the Capital Improvements or Repairs, TSJ shall be reimbursed for such cost from the Capital Improvement Reserve. TSJ may charge the cost of TSJ's employees who provide direct labor to the implementation of the Capital Improvements and Repairs; provided, however, TSJ shall not be reimbursed for any costs of TSJ's staff or overhead related to overall supervision of such activity.

TSJ shall comply with the following general requirements in the course of causing the Capital Improvements and Repairs to be completed:

- (a) In the event, and to the extent, that any Capital Improvements and Repairs constitute a "public works project," as defined in Section 1217 of the City Charter, TSJ shall observe all public bidding requirements associated with such projects as prescribed by Section 1217 of the City Charter.
- (b) All applicable and required approvals of plans and specifications, permits, and all other approvals and documents required, shall be fully applicable to, and obtained by TSJ for work projects carried out by TSJ under this Agreement.
- (c) Either directly provide or require the general contractor performing work on the project to provide payment and performance bonds in the amount of the total value of all construction contracts entered into for the construction work to be performed in accordance with SECTION 12.7 below.
- (d) Construction Documents, permits, and City's standard specifications may be modified only by field order changes.
- (e) Inspection of the work shall be performed on a regular basis by the City's Department of Public Works in its normal course of business.
- (f) If, at any point during construction, City determines that the work is not

being performed in a manner that complies with this SECTION 12.6, City shall have the right to stop the construction and direct TSJ to correct the deficiency.

- (g) Either directly provide or require the general contractor and all subcontractors performing work on the project to provide insurance as set forth in EXHIBIT B.
- (h) All applicable federal, state and local laws and policies regarding public works construction shall be adhered to, including, but not limited to, the payment of prevailing wages.
- (i) Provide full sets of Construction Drawings, Specifications and "as-built" record drawings to City for each capital project executed.

12.7 Surety Bonds. Unless the prior written approval of City has been obtained, TSJ shall not commence the construction of Facility improvements without the issuance of surety bonds of the types, in the amounts, and for the purposes described below. City shall approve TSJ's request to proceed without bonds if TSJ provides to City a letter of credit or other assurance, reasonably acceptable to City, to ensure that funds will be available to complete any work commenced by TSJ. Such surety bonds shall be duly executed by a responsible corporate surety authorized to issue such bonds in the State of California, and shall be obtained through an authorized agent with an office in California.

TSJ, or TSJ's general construction contractor, shall pay all bond premium costs and incidentals as a part of the project cost. Each bond shall be signed by either TSJ or TSJ's general construction contractor and the surety, and shall name the City of San José and TSJ as beneficiaries thereof.

The following types and amounts of surety bonds shall be provided for each particular Facility improvement project:

- (a) A "Payment Bond" (Material and Labor Bond) in the amount of 100% of the contract price, for construction of the particular Facility improvement project, which shall meet the requirements of California Civil Code Sections 3247 and 3248, and shall be maintained in full force and effect until the particular Facility improvement is completed and a certificate of completion is recorded (to the extent required); and
- (b) A "Faithful Performance Bond" which shall be for 100% of the contract price for construction of a particular Facility improvement project to guarantee faithful performance of all work in accordance with the approved plans and specifications, and to guarantee that all materials and workmanship will be free from original or developed defects.

Should any bond become insufficient, TSJ or TSJ's general construction contractor shall renew the bond within 10 days after receiving notice from City.

Should City reasonably determine that a surety is or has become unsatisfactory to City, notice will be given to TSJ to that effect and TSJ or TSJ's general

construction contractor shall obtain a new surety reasonably acceptable to City.

TSJ shall require that changes in work within the scope of the original work, and/or extensions of time made pursuant to the construction contract(s), shall in no way release the surety from its obligations. Notice of such changes or extensions shall be waived by the surety.

- 12.8 **Pre-Construction Planning; Fixed Price Contracts.** With regard to all Facility improvement projects carried out by TSJ under this Agreement, TSJ agrees to use its reasonable good faith efforts to plan and prepare for the construction of such improvements well in advance of the commencement of construction and to allow reasonable and adequate time for the development of complete plans and specifications for each project and the selection of a contractor. Each construction contract entered into by TSJ hereunder shall provide for a guaranteed maximum or fixed price unless City has given prior written approval to a different form of contract.
- 12.9 **Budgeting.** Prior to commencement of construction of any Capital Improvement and Repair paid for with funds budged in Fund 536 and carried out by TSJ under this Agreement, TSJ shall provide City with written notice of TSJ's estimate of the total costs and expenses to be incurred in connection therewith, including costs for construction, architectural, engineering, design and other services connected with the preparation of the plans and specifications for the project and, unless the work is within the costs allocated in and approved by the parties as part of the Capital Budget, obtain City's prior written approval thereof.
- 12.10 **Expansion of Facilities.** City reserves the right to expand or alter the Facilities. If expansion or alteration will have an impact on Operating Revenue and/or Operating Expenses, City and TSJ agree to revise the Adopted Operating Budget to take such changes into account. TSJ agrees to operate the Facilities as expanded or altered. City and TSJ shall also modify the Performance Measures in SECTION 4.9 and Incentive Fee Measures in SECTION 7.4 to take into account expenditure and revenue changes that are reasonably likely to arise from the expansion activity.
- 12.11 **Project Management.** Capital Improvement Projects will be managed based on the complexity and scope of the project as follows:
- (a) Standard Maintenance Projects. For purposes of this Agreement, "Standard Maintenance Projects" are single construction trade projects that consist of the repair or replacement of items or materials to their near original condition with like kind materials and that do not include activities associated with Complex Improvement Projects. Standard Maintenance Projects may, at the election of TSJ, be managed by TSJ; provided, however, the Public Works Facilities Division will be the point of contact for permit and code inspection when applicable.
 - (b) Complex Improvement Projects. For purposes of this Agreement, "Complex Improvement Projects" are projects that consist of Capital Improvements or repairs that (i) require engineering, (ii) involve modifications to a significant building system (HVAC, plumbing, electrical,

etc.), (iii) have complex, interdisciplinary construction trade issues, or (iv) require changes to the built condition of the Facility. Complex Improvement Projects shall be managed by the City and shall require design by the Public Works Facilities Division or its consultant, bidding in accordance with City requirements, and inspection by Public Works Engineering Services Division. Complex Improvement Projects may be managed by the Public Works Facilities Division or City Facilities, Architectural Services Division depending on the scope of the project; provided, however, it is agreed that the Department of Public Works will be responsible for project lead and management duties, and will coordinate with TSJ, the applicable City contract oversight personnel, and the City Budget office to identify funding sources outside of TSJ and Facility operations.

SECTION 13. INTERNET SERVICE ACCESS.

During the term of this Agreement, TSJ is granted a non-exclusive, non-terminable (except upon termination of this Agreement) right to high-speed internet access subject to all terms and conditions of this Agreement including, without limitation, (a) the terms and conditions set forth in the Internet Service Access Addendum in the form of Exhibit G attached hereto, and (b) the terms and conditions set forth in agreements between the City and Cogent Communications and Hurricane Electric, LLC (attached hereto as Appendices 1 and 2, respectively).

SECTION 14. PERSONNEL.

All personnel employed by TSJ shall be employees of TSJ and not of City. TSJ shall select the number, function, qualifications, and compensation, including salary and benefits, of its employees, and shall control the terms and conditions of employment relating to such employees.

SECTION 15. AGREEMENT MONITORING.

- 15.1 **Monitoring Designee.** TSJ agrees to name a specific individual to monitor the Agreement who, as of the Effective Date, shall be TSJ's Chief Financial Officer.
- 15.2 **Authority of Contract Administrator.** City agrees that its City Manager shall name a specific individual as the Contract Administrator. The Contract Administrator shall have such authority as set forth in this Agreement. The Contract Administrator shall be the primary liaison between TSJ and City on all matters relating to this Agreement, and shall have the primary responsibility for monitoring and assessing the quality of services provided and contract compliance by TSJ.
- 15.3 **City Ex-Officio Members to TSJ Board of Directors and Finance Committee.** TSJ agrees that its Board of Directors and Finance Committee will each include two City ex-officio positions reserved for City designated officials from the City Manager's Office and from the City Council to attend meetings of TSJ's Board of Directors and Finance Committee. TSJ agrees to provide the City ex-officio members with notice of, as well as printed and electronically distributed materials for, all meetings and will allow such ex-officio members to attend all meetings.

The Board and Committee may exclude ex-officio members from Board discussions regarding personnel decisions and labor and City contract negotiations. The ex-officio members are not members of the Board of Directors and will have no voting rights. In the event that it is determined that the ex-officio members are actual members of the Board of Directors with voting rights, the City agrees to amend this SECTION 15.3 to the extent necessary to modify the status of such individuals and to eliminate any such voting rights.

- 15.4 **Officers; Form 990 Reporting.** TSJ agrees that, upon City's request, it shall deliver to City, in an electronic format reasonably acceptable to City, (1) a list of TSJ's then-current officers and former officers (each as defined below) who served within the prior 12 months of the request, (2) a copy of the TSJ's then-current organizational chart reflecting lines of authority within TSJ, and (3) a copy of the Form 990 most recently filed with the Internal Revenue Service. For purposes of this SECTION 14.4, the terms "officers" and "former officers" means and is limited to the President and Chief Executive Officer, Chief Operating Officer, Vice President of Sales, Chief Financial Officer, Director of Human Resources, and Director of Communications and Public Affairs.

SECTION 16. EXTENT OF AUTHORITY.

16.1 Contracts.

- (a) Subject to the requirements of this SECTION 16.1 and SECTION 8.3, TSJ shall have the sole authority to enter into any and all contracts relating or pertaining to the Facilities and their operations, provided such contracts are consistent with the Adopted Operating Budget and all provisions of this Agreement.
- (b) All contracts entered into by TSJ after the date of this Agreement with respect to the operation of the Facilities (each a "Third Party Agreement") shall provide that, in the event of the termination of this Agreement, (1) the Third Party Agreement is assignable to City or its designee without the other contracting party's consent, and (2) in the event of assignment to City, the Third Party Agreement is terminable by City (other than contracts for the license or use of the Facilities in the ordinary course) with or without cause on 30 days written notice from City. City agrees that, upon the expiration or termination of this Agreement, or assignment of such contracts to City or its designee for any reason, City or its designee shall assume in writing all such assigned contracts, provided that neither City nor its designee shall assume any damages, losses, fines, penalties, forfeitures, liabilities, costs or expenses, of every kind and nature whatsoever, caused by TSJ under such contracts. City further agrees to indemnify, defend, and hold TSJ, and its officers and directors harmless from any and all liabilities, claims, and losses arising under any contracts assigned to City from and after the date of such assignment.

- 16.2 **Purchase of Supplies and Services.** In connection with the purchase by TSJ of equipment, materials, goods, supplies and inventories for the Facilities, TSJ shall endeavor to make all such purchases at the best price available to TSJ, taking into account, whenever reasonably possible, the quantities required, the

quality desired, time available for delivery, sources of supply, and volume purchases. TSJ shall pass on to the Facilities the full amount of any volume discounts and other discounts available to TSJ. TSJ shall also exercise its best efforts to comply with City's Environmentally Preferable Procurement Policy (Council Policy 4-6). A description of environmentally preferable procurement and the Policy can be found on the City's website at the following link: <http://www.sanjoseca.gov/esd/natural-energy-resources/epp.htm>. City will provide TSJ with not less than 15 days written notice prior to the effectiveness of any change to the Environmentally Preferable Procurement Policy.

- 16.3 **Facility Use Agreements.** TSJ shall allow the use of the Facilities by third parties for events, meetings, performances, shows, exhibitions, etc., only through written Facility Use Agreements, the current forms of which are attached hereto as EXHIBIT D. TSJ may negotiate the compensation, duration, and extent of use of the Facilities, as well as specific terms of the form Facility Use Agreement, as TSJ determines is in the best interests of the successful operation of the Facilities.

SECTION 17. LABOR COMPLIANCE.

This Agreement is subject to City's Living Wage and Prevailing Wage Policies and the applicable implementing regulations (collectively, the "Policy"). Subject to any Collective Bargaining Agreement then in effect between TSJ and one or more labor unions, TSJ shall comply with the provisions of the attached Labor Compliance Addendum (EXHIBIT D), which sets forth TSJ's obligations under the Policy and shall pay not less than the General Prevailing Wage Rates as determined by City's Office of Equality Assurance ("OEA") for TSJ's employees for applicable/appropriate classifications working at the Facilities. Such rates may be adjusted from time to time throughout the performance period of the Agreement and a copy of the effective rates may be obtained from OEA.

SECTION 18. INDEMNIFICATION.

To the extent that City is not fully compensated by insurance, TSJ covenants and hereby agrees to indemnify, defend, protect, and hold harmless City, its officers, employees, contractors, and agents, from and against any and all claims, demands, obligations, liabilities, losses, costs, expenses, penalties, suits, and judgments (collectively "Losses"), at any time received, incurred or accrued by City, its officers, employees, contractors, or agents arising out of or resulting in whole or in part from: (1) any negligent act (or failure to act) of TSJ, its directors, officers, or employees, (2) TSJ's **noncompliance** with any laws respecting the condition, use, occupation, or safety of the Facilities, or any part thereof, so long as there is adequate funding under this Agreement to address such compliance, (3) TSJ's services under this Agreement, or (4) TSJ's failure to do anything required under this Agreement, except as may arise from the negligence or the willful misconduct of City, its officers, employees, contractors, or agents. The acceptance by City of TSJ's services and duties under this Agreement shall not operate as a waiver of such right of indemnification. Notwithstanding the foregoing, TSJ shall have no indemnity or other liability arising from City's failure to fund or address Capital Improvements and Repairs to the Facilities that are identified by TSJ, including, without limitation, any claim arising from any failure to comply with any Americans with Disabilities Act requirements.

To the extent that TSJ shall not be fully compensated by insurance, City covenants and hereby agrees to indemnify, defend, protect, and hold harmless TSJ, its directors, officers, employees, contractors, and agents, from and against any and all Losses at any time received, incurred or accrued by TSJ, its directors, officers, agents, employees, or contractors arising out of or resulting in whole or in part from: (1) any act (or failure to act) of City, its Council members, officers, employees, contractors, agents, clients, permittees or invitees, (2) noncompliance with any laws respecting the condition, use, occupation, or safety of the Facilities, or any part thereof, (3) Operating Deficiencies, (4) City's obligations under the Agreement, or (5) City's failure to do anything required under this Agreement, except as may arise from the negligence or the willful misconduct of TSJ, its directors, officers, employees, or agents.

This SECTION 18 shall survive the expiration or earlier termination of this Agreement.

SECTION 19. DISPUTE RESOLUTION.

Any dispute regarding the interpretation or performance of this Agreement shall be resolved in accordance with the provisions of this SECTION 19.

- 19.1 **First Level.** Either party may notify the other party of the dispute in writing with a brief statement of the party's position. The parties shall then schedule a meeting between the City Manager and TSJ's Chief Executive Officer (or designee) to resolve the dispute. The City Manager and TSJ's Chief Executive Officer (or designee) shall endeavor in good faith to resolve the dispute. If the dispute is resolved, the parties shall make a written record of the resolution.
- 19.2 **Second Level.** Any dispute that has not been resolved by the City Manager and TSJ's Chief Executive Officer (or designee) may be resolved through a resolution process administered by JAMS or another judicial mediation service mutually acceptable to the parties located in San Jose, California. Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with JAMS and with one another in selecting a single mediator from JAMS panel of neutrals, and in scheduling the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct, and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts, and attorneys, and by the mediator and any JAMS employees, are confidential, privileged, and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. The provisions of this paragraph may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees, and expenses, including attorneys' fees, to be paid by the party against whom enforcement is ordered.
- 19.3 **Failure to Resolve Dispute.** If mediation is conducted but is unsuccessful, or if no mediator is agreed to, either party may use whatever legal remedies are available to resolve the dispute.

SECTION 20. HAZARDOUS MATERIALS.

- 20.1 **Definition of “Hazardous Materials”.** Subject to the last sentence of this paragraph, “Hazardous Materials” means any and all (1) substances, products, by-products, waste, or other materials of any nature or kind whatsoever, which is or becomes listed, regulated, or addressed under any environmental laws, (2) materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself, or in combination with other materials, substances, products, by-products, or waste, may give rise to liability under any environmental law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict, or absolute liability, or under any reported decisions of any state or federal court, and (3) substances, products, by-products, waste, or any other materials which may be hazardous or harmful to the air, water, soil, environment, or affect industrial hygiene, occupational, health, safety, and/or general welfare conditions, including, without limitation, petroleum and/or asbestos materials, products, by-products, or waste. City agrees to disclose to TSJ the existence of any and all known or suspected Hazardous Materials located in or on the property of Facilities. Notwithstanding the foregoing, the term “Hazardous Materials” does not mean or include, to the extent used and disposed of properly and required for everyday uses or normal housekeeping or maintenance, (1) fuel oil and natural gas for heating, (2) lubricating, cleaning, coolant, and other compounds customarily used in building maintenance, (3) material routinely used in the day-to-day operations of an office (such as copier toner), (4) consumer products used as such, (5) material reasonably necessary and customarily used in construction and repair of an office project, and (6) fertilizers, pesticides, and herbicides commonly used for routine landscaping.
- 20.2 **Use and Storage of Hazardous Materials Prohibited.** The use and storage of Hazardous Materials (as defined above, and excluding the items described above for everyday uses, housekeeping, and/or maintenance) by TSJ in the Facilities is prohibited. Upon becoming aware of any release of a Hazardous Material in the Facilities, TSJ shall immediately report such release to City and to any other appropriate public agency. TSJ shall immediately report the release of any Hazardous Material to the City even where the quantities released would not be otherwise reportable to another public entity. This reporting obligation exists with regard to any release of Hazardous Material within the Facilities and is not limited to releases of those Hazardous Materials used by TSJ.

SECTION 21. AMERICANS WITH DISABILITIES ACT (ADA).

To the extent that the structural and architectural elements and condition of the Facilities permit without modification, TSJ shall be solely and fully responsible to comply with the Americans with Disabilities Act of 1999 (“ADA”) in connection with: (1) any use of the Facilities by guests or services provided by TSJ to customers, and (2) modifying its policies, practices, and procedures to comply with the ADA. TSJ shall develop a work plan to correct or avoid any violations or non-compliance with the ADA; provided, however, implementation of any such plan shall be subject to approved funding. TSJ shall perform an assessment of Facilities for ADA compliance and notify City of any compliance issues.

SECTION 22. CITY’S RIGHT TO ACCESS FACILITIES.

TSJ agrees that the City's authorized representatives may, upon reasonable advance notice to TSJ, have access to and the right to examine the Facilities and TSJ's performance under the Agreement during normal business hours; provided, however, TSJ may, from time to time, restrict City's access to portions of the Facilities that are subject to temporal user/client required restrictions imposed under an applicable Facility Use Agreement for the purpose of protecting sensitive user/client information, products, or materials during the period of user/client's use of the Facilities.

SECTION 23. INSURANCE REQUIREMENTS.

TSJ agrees to have and maintain the policies of insurance as set forth and described on EXHIBIT B attached hereto. All policies, endorsements, certificates, and/or binders shall be subject to approval by the Risk Manager of the City as to form and content. The insurance requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. TSJ agrees to provide City with a copy of said policies, certificates, and/or endorsements before work commences under this Agreement.

SECTION 24. CLAIMS REPORTING.

City and TSJ shall each give prompt notice to the other of any claims made against each other or both of time, and shall cooperate fully with the other and with any insurance carrier to the end that all such claims will be properly investigated and defended. To the extent practicable, City and TSJ shall jointly select counsel to represent their mutual interests in any litigation. TSJ shall also cause to be investigated all accidents and claims for damage relating to the operation and maintenance of Facilities, as they become known to TSJ, shall report to City any accident or claim for damage that is material, as it becomes known to TSJ, together with the estimated cost of repair thereof, and prepare any and all reports required by TSJ as the result of an incident mentioned in this SECTION 24.

SECTION 25. WAIVER.

The parties agree that the waiver of any breach or violation of any provision of this Agreement by either party shall not be deemed to be a waiver of any other provision or a waiver of any subsequent breach or violation of the same or any other provision by such party. The acceptance of a party's performance by the other party will not be a waiver of any provision of this Agreement.

SECTION 26. COMPLIANCE WITH LAWS.

TSJ shall comply with all applicable laws, ordinances, codes, and regulations (collectively, "Laws") of the federal, state, and local governments to the extent applicable to TSJ's performance under this Agreement, including, without limitation, any and all Laws specified elsewhere in this Agreement. TSJ shall obtain all licenses, permits, certificates, consents, approvals, or other entitlements required for TSJ's operation of the Facilities.

SECTION 27. CONFLICT OF INTEREST.

27.1 General Standard. TSJ shall avoid all conflicts of interest or the appearance of conflict of interest in performance of this Agreement.

- 27.2 **Special Requirements.** TSJ's Chief Executive Officer shall file an Assuming Office Disclosure Statement of Economic Interests (Form 700). Such statement shall be filed within 30 days of the date of this Agreement and annually thereafter by the first of April. TSJ's Chief Executive Officer shall file a Leaving Office Statement within 30 days of (a) exiting the position or (b) termination of this Agreement, whichever occurs earlier.

SECTION 28. NONDISCRIMINATION.

TSJ shall not discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, or national origin, in connection with or related to the performance of this Agreement.

SECTION 29. PROHIBITION ON GIFTS.

TSJ is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code. TSJ agrees not to knowingly or intentionally offer any City officer or designated employee any gift prohibited by said Chapter. The knowing or intentional offer or giving of any gift prohibited by Chapter 12.08 of the San José Municipal Code shall constitute a material breach of this Agreement by TSJ. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for such breach as provided in SECTION 6.2 of this Agreement. Notwithstanding the foregoing, it is agreed that TSJ may from time to time deliver to the Contract Administrator complimentary tickets to ticketed events at one or more of the Facilities for distribution among City personnel as determined by the Contract Administrator in accordance with the City's Ticket Distribution Policy.

SECTION 30. EXEMPTION OF FORMER CITY EMPLOYEES.

TSJ is familiar with Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance") relating to the disqualification of City's former officers and employees in matters which are connected with their former duties or official responsibilities. Notwithstanding the foregoing, City acknowledges and agrees that TSJ is a "nonprofit organization" as that term is defined by Section 12.10.020.E of the Revolving Door Ordinance and that, pursuant to Section 12.10.050 of the Resolving Door Ordinance, none of the employees of TSJ are subject to the prohibitions of the Revolving Door Ordinance, including, without limitation, the provisions of Section 12.10.30.

SECTION 31. TSJ'S BOOKS AND RECORDS.

- 31.1 **Maintenance During Term.** TSJ shall maintain any and all contracts, ledgers, books of account, invoices, vouchers, cancelled checks, and other documents evidencing or relating to charges for services, or expenditures and disbursements charged to City for three years, or for any longer period required by law, from the date of final payment to TSJ pursuant to this Agreement.
- 31.2 **Maintenance After Term.** TSJ shall turn over to City all documents which demonstrate performance under this Agreement upon termination or completion of this Agreement.

- 31.3 **Inspection.** Any documents required to be maintained pursuant to this Agreement must be made available for inspection or audit at the offices of TSJ, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. The records shall be available at TSJ's address indicated for receipt of notices in this Agreement, and may not be removed except (i) with the consent of TSJ, or (ii) when necessitated by governmental audit requirements. TSJ acknowledges that, under certain circumstances specified in California Government Code Section 8546.7, this Agreement (if it involves an expenditure of \$10,000 or more of public funds) may be subject to examination and audit by the State Auditor of the State of California pursuant to California Government Code Section 8546.7. Notwithstanding the foregoing, the parties acknowledge and agree that TSJ is not a legislative body as defined in Government Code Section 54952, and is not subject to the California Public Records Act. Further notwithstanding the foregoing, the parties acknowledge and agree that, where TSJ has been required to maintain the confidentiality of information sources, the name of the client or source of information will be redacted or identified with an alpha or numeric code maintained solely by TSJ, and TSJ shall have no obligation to identify or reveal the coding. To the extent that TSJ delivers any documents to City, City agrees to maintain the confidentiality of any documents owned by TSJ and clearly marked by TSJ as "Confidential" or "Proprietary", except to the extent otherwise required by law or permitted in writing by TSJ. TSJ acknowledges that City is subject to the California Public Records Act.
- 31.4 **Custody of Records.** If TSJ elects to dissolve or to abandon or terminate its business and, as a result thereof, City has reason to believe that any of TSJ's documents relating to this Agreement may be lost or discarded, City may, by written request by the City Attorney, City Auditor, City Manager or designated representative of any of these officers, require that custody of TSJ's documents be given to City and that these documents be maintained in City Hall or such other location to be determined by City. City agrees to grant access to TSJ's documents to any party authorized by TSJ, TSJ's representatives, or TSJ's successor-in-interest.
- 31.5 **Facilities Audit Process.** At City's request and expense, TSJ shall schedule a Facilities audit to be conducted by the Capital Industry Advisor and TSJ in order to mutually determine the nature and extent of items of furniture, fixtures, and operating equipment to be included as part of the furniture, fixtures, and equipment of the Facilities, the category thereof, and the period for replacement and repair thereof, such that the Facilities shall be maintained in accordance with SECTION 4 of this Agreement.
- 31.6 **Annual Audited Financial Statement Reporting.** At the end of each Operating Year, an audit of the books and records of the Facilities shall be performed by the External Auditor, such audit to be completed and a report to be furnished within 120 days after the end of such Operating Year (or such period as reasonably requested by City's Director of Finance). The audited financial statements shall include a Balance Sheet, Income Statement, Statement of Changes in Financial Position, and a Statement of Total Revenues (if not shown on the income statement) prepared in accordance with GAAP and governmental accounting standards accompanied by an opinion with regard thereto, if

obtainable, of the External Auditor. A separate audit report will be provided as a component unit of the City in addition to the necessary schedules and other financial information and disclosures needed for the City's Comprehensive Annual Financial Report. Costs for such audit services will be paid by TSJ from the Operating Account and allocated as a cost of the Facilities, but shall be recorded below the line of Gross Operating Profit.

SECTION 32. ASSIGNABILITY.

The parties agree that the expertise and experience of TSJ are material considerations for this Agreement. Unless specifically authorized by this Agreement, TSJ may not assign the performance of any obligation or interest under this Agreement without the prior written consent of City, which consent is at the absolute discretion of City. Any attempt by TSJ to assign this Agreement in violation of this SECTION 32, will be voidable at City's sole option.

SECTION 33. SUBCONTRACTORS.

33.1 Authorized Subcontractors. Notwithstanding SECTION 32 above, TSJ may use subcontractors in performing TSJ's services without City approval, and TSJ may enter into contracts with such subcontractors with respect to performing certain of TSJ's obligations under this Agreement so long as such contracts are assignable to and/or terminable by City in the event that this Agreement is terminated. TSJ shall be responsible for directing the work of subcontractors and for any compensation due to subcontractors. City assumes no responsibility whatsoever concerning such compensation.

33.2 Compliance with Agreement. TSJ's subcontracting of any portion of its obligations under this Agreement shall not relieve it from liability and responsibility for the performance of such obligations required to be performed by TSJ under this Agreement. TSJ shall ensure that TSJ's subcontractors comply with this Agreement to the extent applicable to the services to be rendered by such subcontractor on behalf of TSJ.

SECTION 34. GOVERNING LAW.

City and TSJ agree that the law governing this Agreement shall be that of the State of California without giving effect to its conflict of law principles.

SECTION 35. JURISDICTION.

In the event that suit shall be brought by either party to this Agreement, the parties agree that venue must be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

SECTION 36. NOTICES.

All notices and other communications required or permitted to be given under this Agreement must be in writing and must be personally served or mailed, postage prepaid via U.S. mail, and return receipt requested, or sent via courier services, addressed to the

respective parties as follows:

To City: City of San José
Attention: City Manager
200 East Santa Clara Street
San Jose, CA 95113-1905

To TSJ: Team San Jose
Attention: Chief Executive Officer
San Jose Convention Center
408 Almaden Boulevard
San Jose, CA 95113

With a copy to: Hopkins & Carley
Attention: Lloyd A. Schmidt
70 S. First Street
San Jose, CA 95113

Notice will be effective on the date personally delivered or, if sent by courier service, on the date of receipt. If mailed, notice will be effective three (3) days after deposit in the mail. The parties may change their respective addresses in accordance with the provisions of this SECTION 36.

SECTION 37. MISCELLANEOUS.

- 37.1 **Interpretation.** Whenever the singular number is used in this Agreement and when required by the context, the same shall include the plural, and the masculine gender shall include the feminine and neuter genders. Days, unless otherwise specified, shall be calendar days.
- 37.2 **Severability.** In the event any covenant, condition or provision herein contained is held to be invalid by a court of competent jurisdiction, the invalidity of any such covenant, condition or provision shall in no way affect any other covenant, condition or provision herein contained, provided the invalidity of any such covenant, condition or provision does not materially prejudice either City or TSJ in its respective rights and obligations contained in the valid covenants, conditions and provisions of this Agreement.
- 37.3 **Binding on Successors.** Subject to the provisions of SECTION 32, this Agreement binds and inures to the benefit of the parties and their respective successors and assigns.
- 37.4 **Headings.** The headings of the sections and exhibits of this Agreement are inserted for convenience only; they do not constitute part of this Agreement and are not to be used in its construction.
- 37.5 **Authority of City Manager.** Where this Agreement requires or permits City to act and no officer of the City is specified, the City Manager of the City or the designated representative of the City Manager has the authority to act on City's behalf.

- 37.6 **Entire Agreement.** This Agreement, the Schedules attached hereto, and the Exhibits described in SECTION 1.3 contain all of the agreements, representations, and understandings of the parties hereto, and, subject to the last sentence of this paragraph, supersede and replace any previous understandings, commitments, or agreements, whether oral or written. In the event of any discrepancies or inconsistencies between the provisions of this Agreement and any of the documents referred to in SECTION 1.3, the provisions of this Agreement will control. Without limiting the generality of the foregoing, effective on the Commencement Date, the Agreement Documents, as defined by this Agreement, specifically supersede and replace the Original Agreement and the ancillary documents referred to therein in their entirety, and it is agreed that, on the Commencement Date, the Original Agreement is terminated and is of no further force or effect. From time to time, the exhibits may be modified by mutual agreement of TSJ and the City; provided, however, TSJ may, without the consent of the City, negotiate revisions to the form of Facility Use Agreement from time to time with specific users in order to secure agreements for use of the Facilities. Notwithstanding the foregoing, the Original Agreement shall continue in full force and effect, and shall govern the relationship of the parties hereto, during the period from the Effective Date to the Commencement Date.
- 37.7 **Standard of Consent.** Unless specifically provided otherwise, whenever in this Agreement the approval or consent of a party is required, such approval or consent must be in advance, shall be in writing, shall not be unreasonably withheld or delayed, and shall be executed by a person having the express authority to grant such approval or consent.
- 37.8 **No Assumption by City.** The review, approval, inspection, examination or consent of City or to any item to be reviewed, approved, inspected, examined or consented to by City shall not constitute the assumption of any responsibility by City for either accuracy or sufficiency of any item or the quality or suitability of such item for its intended use. No third parties, including persons claiming under TSJ, shall have any rights hereunder.
- 37.9 **Exhibits and Schedules.** All exhibits, schedules, and addenda referred to herein, and any exhibits, schedules, and/or addenda which may from time to time be referred to in any duly executed amendment thereto, are by such reference incorporated herein and shall be deemed a part of this Agreement as if set forth in full herein.
- 37.10 **Third Party Beneficiaries.** The provisions of this Agreement are intended solely for the benefit of City and TSJ, and create no rights or obligations enforceable by any third party, including any creditor of City or TSJ, except as otherwise provided by applicable law.

SECTION 38. EFFECTIVENESS SUBJECT TO APPROPRIATION.

The parties agree and acknowledge that pursuant to San José Municipal Code Section 4.04.020, it is a prerequisite to the effectiveness of this Agreement that moneys be appropriated in an amount sufficient to fund the obligations of City under this Agreement. City and TSJ further agree that, in the event that the City Council does not appropriate the funding for this Agreement, it shall become null and void.

The parties have executed this Agreement for the Management of the San José Convention Center and Cultural Facilities, as of the Effective Date, notwithstanding the actual date of execution.

APPROVED AS TO FORM:

CITY OF SAN JOSE,
a municipal corporation

ELIZABETH A. KLOTZ,
Deputy City Attorney

By:

TONI J. TABER, CMC
City Clerk

TEAM SAN JOSE,
a California nonprofit corporation

By:

Karolyn Kirchgesler,
President and Chief Executive Officer

SCHEDULE 4.9

SAMPLE CALCULATION OF WEIGHTED ACHIEVEMENT PERCENTAGE

| | | | | PERFORMANCE | | INCENTIVE | |
|--------------------------------|------------|------------|---|-------------|--------|-----------|--|
| GOAL | | Results | % | ACHIEVED | WEIGHT | SCORE | |
| Economic Impact | | | | | | | |
| Hotel Room Nights | 44,500 | 50,229 | | 112.9% | 10% | 11.3% | |
| Event Attendance | 441,471 | 534,270 | | 121.0% | 10% | 12.1% | |
| Estimated Impact | 25,610,986 | 29,388,514 | | 114.7% | 10% | 11.5% | |
| Return on Investment | \$ 2.90 | \$ 2.97 | | 102.4% | 10% | 10.2% | |
| Gross Operating Profit/Revenue | | | | | | | |
| Gross Operating Revenue | 6,203,823 | 8,732,663 | | 140.8% | | | |
| Gross Operating Profit | 1,809,769 | 2,584,963 | | 142.8% | 40% | 57.1% | |
| Theatre Performance | | | | | | | |
| # of Performances - TOTAL | 90% | 90% | | 100.0% | 5% | 5.0% | |
| Special Events Days - TOTAL | 8% | 8% | | 100.0% | 5% | 5.0% | |
| Customer Satisfaction | | | | | | | |
| Satisfaction Rate | 95% | 97% | | 102.1% | 10% | 10.2% | |
| | | | | | 100% | 123% | |

SCHEDULE 4.9(a)(ii)

METHODOLOGY FOR MEASURING ATTENDANCE

Attendance- to be measured and reported as the following visitor types:

Local/Social Visitors: Attendees who do not require overnight accommodations. For events where there are no hotel room nights attached- all attendees are counted as *Local/Social Visitors* (with the exception of any *Exhibitor* attendees).

Out of Town Visitors: Attendees who require overnight accommodations.

Exhibitors: Attendees whose focus is to exhibit products, services, etc., to *Visitors* attending the host event.

Likewise, the operator will use the following methodology for calculating and reporting attendance by event type:

Industry Tradeshows/Conventions: The Convention Services Department of Operator will distribute a post-event survey to the meeting planner that captures total attendance figures estimated by the sponsoring organization.

Food Functions/Social Events: The event coordinator will report the actual post-event food and beverage invoiced attendance (rather than the pre-event guaranteed attendance estimate).

Ticketed Public Entertainment Events: Exact attendance will be calculated based on the total number of tickets collected or scanned by the ushers at the close of the event. The figure will then be reported to Operator. If no ticket count is available, attendance will be based on client's post-attendance record via a post-event survey as described above.

Public Tradeshows: Exact attendance will be calculated based on the total number of tickets collected or scanned by the ushers at the close of the event. The figure will then be reported to Operator. If no ticket count is available, attendance will be based on client's post-attendance record via a post-event survey as described above.

Non-Ticketed Public Events: The Convention Services Department of Operator will distribute a post-event survey to the meeting planner that captures total attendance figures estimated by the sponsoring organization.

Small Meetings/Seminars: The Convention Services Department of Operator will distribute a post-event survey to the meeting planner that captures total attendance figures estimated by the sponsoring organization.

SCHEDULE 4.9(a)(iii)

ECONOMIC IMPACT MATRIX

Estimated Economic Impact Calculations

Calculations for Estimated Economic Impact (EEI) are derived from applying formulas to attendance figure. For the onset of the term of this agreement, TSJ will utilize two calculators to calculate EEI based on the function-type of the event being calculated. The calculator developed on behalf of the Office of Economic Development (OED) by SportsEconomics of EEI at large public festivals and sporting events and a second calculator developed by DMAI for the valuation of EEI at conventions, tradeshows and meetings. The calculator used for each event will be based on the event type as entered into the EBMS database. The following key determines the calculator used at the start of this contract:

| Event Type | Calculator |
|---------------------------------|-------------------|
| Banquet / Reception | DMAI |
| Business to Business | DMAI |
| Concerts / Dances | OED |
| Conferences | DMAI |
| Consumer / Public Tradeshows | DMAI |
| Conventions | DMAI |
| Meetings | DMAI |
| Performing Arts | OED |
| Seminars | DMAI |
| Special Events | DMAI |
| Sports | OED |

The calculation will be conducted by TSJ as part of the post-event attendance update and entered into EBMS. A backup PDF of each produced report will be included as an attachment in EBMS as well. Economic Impact will be reported as a sum of all events that occur primarily in the San Jose Convention Center and Cultural Facilities for that fiscal year. The target goal for the year will be determined in conjunction with the process for developing all TSJ Performance Measures. It is understood that as DMAI introduces more modules for their calculator TSJ will migrate from the OED calculator to the DMAI calculator as that is becoming the industry standard for reporting the value of meetings and events.

RD:EAK:RPH
01/10/2014

SCHEDULE 4.9(b)

SAMPLE INCOME STATEMENT

T-26492.002\1086141

DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.

Convention & Cultural Facilities Division (CCF)
INCOME STATEMENT
April 30, 2014

| | ACTUAL MTD | BUDGET MTD | Favorable/ Unfavorable | TOT Collections | 0.0% | 0.0% | ACTUAL YTD | YTD BUDGET | Favorable/ Unfavorable |
|--|------------|------------|---------------------------|------------------------------------|----------|--------|--------------|--------------|---------------------------|
| | \$ 703,739 | \$ 703,739 | 23.5% | Parking Revenue | 23.7% | 23.7% | \$ 7,037,388 | \$ 7,037,388 | 27.0% |
| | 312,837 | 253,000 | 8.5% | Building Rental Revenue | 22.1% | 22.1% | 2,526,260 | 2,270,000 | 8.7% |
| | 732,004 | 599,316 | 23.3% | Client Mitigation Discount | 0.0% | 0.0% | 4,737,653 | 3,740,307 | 22.4% |
| | - | - | 0.0% | CVB Rent Subsidy Contra | 0.0% | 0.0% | (1,800) | - | (1,800) |
| | 959,861 | 869,314 | 42.5% | Food & Beverage Services | 10.4% | 48.0% | 10,155,612 | 7,956,471 | 47.5% |
| | 776,617 | 415,359 | 29.0% | Personnel Service Revenue | 87.0% | 22.9% | 4,843,903 | 3,703,422 | 22.1% |
| | 40,619 | - | 0.0% | Electricity/Utility Revenue | 0.0% | 1.7% | 366,379 | - | 366,379 |
| | 176,608 | 120,314 | 5.9% | Commission Revenue | 46.8% | 5.4% | 1,148,434 | 754,952 | 4.5% |
| | 21,590 | 3,000 | 0.1% | Telecommunications/Audio Visual | 619.7% | 1.2% | 253,028 | 24,000 | 0.1% |
| | 12,147 | 6,500 | 0.3% | Ticketing Revenue | 86.0% | 1.0% | 216,360 | 163,801 | 1.0% |
| | (102,769) | - | 0.0% | Revenue Rebates | 0.6% | -2.6% | (553,509) | - | 0.0% |
| | 57,899 | 33,653 | 1.6% | Other Revenue | 72.0% | 0.8% | 432,556 | 432,556 | 2.6% |
| | 9,410 | (4,167) | 0.4% | Event Discount | 0.0% | -0.1% | (74,302) | - | 0.0% |
| | (4,865) | (4,167) | -0.2% | Bad Debt Expense/Settlement | 16.7% | -0.1% | (18,376) | (41,670) | -0.2% |
| | 2,579,121 | 2,043,289 | 88.1% | Total CCF Operations Revenue | 31.1% | 88.9% | 21,167,867 | 16,733,839 | 64.3% |
| | 3,695,697 | 3,000,028 | 100.0% | Total Revenue | 23.2% | 100.0% | 30,731,514 | 26,041,227 | 100.0% |
| | 200,103 | 153,455 | 17.7% | F&B Cost of Sales | -30.4% | 17.7% | 1,938,420 | 1,405,796 | 17.7% |
| | 693,202 | 416,945 | 100.4% | Personnel Service Cost of Sales | -83.3% | 90.3% | 4,372,666 | 3,582,645 | 96.7% |
| | (2,023) | 8,283 | 1.1% | Other Cost of Sales | -24.4% | 0.2% | 9,339 | 62,830 | 1.6% |
| | 891,281 | 578,683 | 26.3% | Total Cost of Sales | -54.0% | 29.9% | 6,320,125 | 5,071,271 | 30.3% |
| | 1,787,840 | 1,464,606 | 71.7% | CCF Gross Margin | 22.1% | 70.1% | 14,947,741 | 11,662,968 | 89.7% |
| | 940,083 | 599,274 | 29.3% | Personnel Expense | -56.9% | 39.2% | 8,302,825 | 6,752,900 | 40.4% |
| | - | - | 0.0% | Client Mitigation Cost | 0.0% | 0.0% | 311 | - | 0.0% |
| | 3,420 | 1,000 | 0.1% | Const. Related/ Incurred | -242.0% | 0.8% | 167,616 | 19,600 | 0.1% |
| | 85,855 | 88,619 | 4.3% | General Direct Expenses | 3.1% | 4.0% | 852,796 | 878,422 | 5.2% |
| | 86,605 | 87,559 | 4.3% | R&M Direct Expenses | 9.4% | 5.1% | 1,084,277 | 878,737 | 5.3% |
| | 177,398 | 182,754 | 8.8% | Utility Direct Expenses | 2.9% | 10.1% | 2,143,057 | 2,008,040 | 12.0% |
| | 1,293,362 | 959,206 | 46.9% | Total Direct Expenses | -34.5% | 59.3% | 12,550,882 | 10,537,699 | 63.0% |
| | 482,480 | 393,532 | 19.3% | Indirect Personnel Expense | -22.6% | 21.2% | 4,477,387 | 3,853,711 | 23.0% |
| | 9,063 | 4,200 | 0.2% | Security/Safety Expense | -115.6% | 0.3% | 49,929 | 55,625 | 0.3% |
| | 218,539 | 147,294 | 7.2% | Other Indirect Expenses | -48.4% | 8.1% | 1,717,575 | 1,484,940 | 8.5% |
| | - | - | 0.0% | Capital Outlay- CCF Funded | 0.0% | 0.0% | 0 | - | 0.0% |
| | (12,002) | (13,334) | -0.7% | Parking Expenses Reimbursement | 10.0% | -0.8% | (120,019) | (133,332) | -0.8% |
| | 698,080 | 531,692 | 26.0% | Total Indirect Expenses | -31.3% | 28.9% | 6,124,871 | 5,260,944 | 31.4% |
| | 2,882,723 | 2,069,581 | 107.6% | Total CCF Operating Expenses | -30.3% | 116.1% | 24,995,879 | 20,869,914 | 14.7% |
| | - | 16,667 | 0.6% | City Use Expense | 100.0% | 0.3% | 102,700 | 166,670 | 0.6% |
| | 41,667 | 41,667 | 1.4% | CVB Marketing Funding | 0.0% | 1.4% | 416,666 | 416,666 | 1.5% |
| | - | - | 0.0% | City Pd Civic HVAC | -60.1% | 5.9% | 114,632 | 200,000 | 14.2% |
| | 20,594 | 10,834 | 7.1% | City Fire Insurance | -11.7% | 9.5% | 184,317 | 108,334 | 7.7% |
| | 89,251 | 101,050 | 3.4% | Parking Operating Expenses | 11.7% | 2.9% | 895,928 | 1,048,598 | 4.0% |
| | 3,034,234 | 2,239,799 | 82.1% | TOTAL EXPENSES | -35.5% | 86.9% | 26,710,120 | 22,808,182 | 87.6% |
| | 661,463 | 760,229 | 25.3% | GROSS OPERATING PROFIT | -13.0% | 13.1% | 4,021,394 | 3,233,045 | 12.4% |
| | 12,500 | 82,502 | 2.1% | Fixed Management Fees | 60.0% | 2.4% | 125,000 | 625,020 | 2.4% |
| | - | - | 0.0% | Management Incentive Fees | 0.0% | 1.1% | 350,000 | 200,000 | 0.8% |
| | 45,833 | (16,667) | -0.6% | Executive Management Fees | 0.0% | 1.5% | 458,333 | - | 0.0% |
| | (7,200) | - | -0.2% | City Use | 56.8% | -0.4% | (109,300) | (166,670) | -0.6% |
| | 4,933 | 12,500 | 0.4% | City Worker's Compensation | 60.5% | 0.2% | 48,967 | 125,000 | 0.5% |
| | - | - | 0.0% | Parking Capital Expense | 0.0% | 0.0% | - | - | 0.0% |
| | 223,586 | 151,950 | 5.1% | Parking Net Transfer | -47.1% | 5.3% | 1,630,332 | 1,222,876 | 4.7% |
| | 247,107 | 571,909 | 19.1% | Other City Directed Expenses | 56.8% | 12.7% | 3,902,582 | 5,720,205 | 22.0% |
| | 526,760 | 782,194 | 26.1% | Total Other City directed expenses | 32.7% | 20.8% | 8,406,814 | 7,726,431 | 26.7% |
| | 134,703 | (21,965) | -0.7% | Net Income/(Loss) | -71.3% | -7.8% | (2,384,420) | (4,493,386) | -17.3% |
| | (782,829) | - | 0.0% | Total Non Op Rev/Exp | 0.0% | -27.3% | (8,393,137) | - | 0.0% |
| | 662,072 | - | 17.8% | Total Contra | 0.0% | 26.2% | 8,058,289 | - | 0.0% |
| | 255,461 | (21,965) | 6.9% | Adjusted Net Income/(Loss) | -1263.0% | -8.7% | (2,049,572) | (4,493,386) | -17.3% |
| | 226,730 | 72,709 | 10.0% | STATISTICAL | | | 1,085,785 | 872,894 | 0.0% |
| | 8,240,517 | 6,637,579 | 80.6% | Attendance | | | 64,669,601 | 57,240,418 | 0.0% |
| | - | - | - | EET | | | - | - | - |

RD:EAK:RPH
01/10/2014

SCHEDULE 4.12

SAMPLE FORM OF QUARTERLY REPORT

T-26492.002\1086141

DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.



MEMORANDUM

**TO: LEE WILCOX,
ASSISTANT TO THE CITY MANAGER**

**FROM: Carolyn Kirchgessler, CEO
TEAM SAN JOSE**

**SUBJECT: TEAM SAN JOSE
QUARTERLY PERFORMANCE
REPORT – 2nd QTR Results,
ENDING December 30, 2014**

DATE: March 6, 2014

RECOMMENDATION

It is recommended that the City Manager's Office forward the Second Quarter status report on performance measure results for Fiscal Year 2013-2014 to the CED Committee for consideration and review at their March 2014 committee meeting.

EXECUTIVE SUMMARY

For Fiscal Year 2013-2014, Team San Jose, in coordination with the City Manager's Office, City Budget and Finance offices developed a budget that reflected performance goals for Team San Jose operations that took into consideration renovation and construction impacts occurring during the first two to three quarters of the fiscal year. The report below outlines performance as of the second quarter of FY 2013-2014, ending December 30, 2013.

Summary of 2nd Quarter Results

Team San Jose met or exceeded 7 of 9 performance measures within the Second Quarter.

2nd Quarter Results include:

- Exceeded TSJ Operating revenue budgeted assumptions by \$187,502, generating \$6.8m in revenue.
- Exceeded Estimated Visitor Spending (EEI) by \$1,760,243, generating \$18.9m in estimated economic impact.
- Missed the attendance goal by 7%, generating 231,496 visitors in the second quarter.
- Exceeded Customer Satisfaction achieving 96% for the 2nd quarter.
- Gross Operating Profit (Revised formula for GOP includes TOT revenue and Parking Net Profit) budgeted goal for the second quarter was \$1,184,120. Team San Jose achieved 142% Gross Operating Profit in the second quarter resulting in \$497,390 favorable outcome to the original adopted budget.
- Team San Jose generated 129,319 (future) hotel room nights definite when compared to a goal of 86,300 (future) hotel room nights for the second quarter.
- Return on Investment measure of \$2.36 was achieved for the quarter or 107% of goal.

San Jose Convention Center Renovation and Expansion Project Client Mitigation Impacts

The San Jose Convention Center forecast was reviewed and approved by CSL the City of San Jose's third-party industry advisor as part of the budget process for FY 2013-2014. Due to construction and renovation in the convention center and the Center for the Performing Arts closed for the entire first quarter related to renovations, a decline in revenue and event bookings was anticipated.

BACKGROUND

Team San Jose (TSJ), an economic development organization and the official convention and visitors bureau for San Jose is charged on the City's behalf to sell San Jose as a destination and to manage the Convention Center and various theaters. Team San Jose's mission is to help spur economic activity in San Jose. Team San Jose's operations are funded in part by a tax on hotel guests, with the remainder generated by the revenue Team San Jose creates through operations.

Customer service is a key ingredient to Team San Jose's success in attracting business to San Jose. Team San Jose customers – from corporations to meeting planners -- say San Jose's unique service model is a strong point of differentiation and improvement from most other destinations' models. San Jose offers one team for all event needs, making it much easier for customers to plan and execute their meetings.

This report is in response to the City Auditor's recommendation to brief the City Council quarterly on Team San Jose efforts.

This report is separated into the following sections:

- Performance Measures: Operating Drivers and Economic Drivers
- Customer service and Theater Performance
- New Bookings and Calendar of Events
- Sales, Marketing and Communications Efforts

2ND QUARTER PERFORMANCE REPORT

PERFORMANCE/INCENTIVE MEASURES

2013-2014 2nd Qtr Performance Results

| GOAL | Results | % ACHIEVED |
|-------------|----------------|-----------------------|
|-------------|----------------|-----------------------|

Economic Impact

| | | | |
|----------------------|------------|------------|---------------|
| Hotel Room Nights | 86,300 | 129,319 | 149.8% |
| Event Attendance | 247,408 | 231,496 | 93.6% |
| Estimated Impact | 17,166,426 | 18,926,669 | 110.3% |
| Return on Investment | \$ 2.20 | \$ 2.36 | 107.3% |

Gross Operating Profit/Revenue

| | | | |
|-------------------------|-----------|-----------|---------------|
| Gross Operating Revenue | 5,661,898 | 6,842,917 | 120.9% |
| Gross Operating Profit | 1,184,120 | 1,681,510 | 142.0% |

Theatre Performance

| | | | |
|-----------------------------|-----|-----|---------------|
| Occupied Days – Partners | 95 | 108 | 113.7% |
| Performance Days – Partners | 38 | 41 | 107.9% |
| Occupied Days – TSJ | 100 | 92 | 92.0% |
| Performance Days – TSJ | 61 | 63 | 103.3% |
| Occupied Days – Total | 195 | 200 | 102.6% |
| Performance Days – Total | 99 | 104 | 105.1% |

Customer Satisfaction

| | | | |
|-----------------------|-----|-----|---------------|
| Customer Satisfaction | 85% | 86% | 101.1% |
|-----------------------|-----|-----|---------------|

2013-2014 YTD Performance Results

| 2013-2014 YTD Performance Results | | | | PERFORMANCE | |
|-----------------------------------|------------|------------|----------------------|--------------|--------------|
| | GOAL | Results | % <i>ACHIEVED</i> | WEIGHT SCORE | |
| Economic Impact | | | | | |
| Hotel Room Nights | 126,200 | 149,331 | <i>118.3%</i> | 10% | <i>11.8%</i> |
| Event Attendance | 358,714 | 324,815 | <i>90.5%</i> | 10% | <i>9.1%</i> |
| Estimated Impact | 24,991,853 | 27,041,367 | <i>108.2%</i> | 10% | <i>10.8%</i> |
| Return on Investment | \$ 1.74 | \$ 1.84 | <i>105.7%</i> | 10% | <i>10.6%</i> |
| Gross Operating Profit/Revenue | | | | | |
| Gross Operating Revenue | 8,486,727 | 9,756,083 | <i>115.0%</i> | | |
| Gross Operating Profit | 728,045 | 839,966 | <i>115.4%</i> | 40% | <i>46.1%</i> |
| Theatre Performance | | | | | |
| Occupied Days - Partners | 172 | 185 | <i>107.6%</i> | | |
| Performance Days - Partners | 66 | 69 | <i>104.5%</i> | | |
| Occupied Days - TSJ | 126 | 110 | <i>87.3%</i> | | |
| Performance Days - TSJ | 80 | 77 | <i>96.3%</i> | | |
| Occupied Days - Total | 298 | 295 | <i>99.0%</i> | 3% | <i>3.0%</i> |
| Performance Days - Total | 146 | 146 | <i>100.0%</i> | 7% | <i>7.0%</i> |
| Customer Satisfaction | | | | | |
| Satisfaction Rate | 95% | 98% | <i>103.2%</i> | 10% | <i>10.3%</i> |

100% **109%**

Revenue

- Team San Jose operations generated \$187.5k in additional revenue for the second quarter, *exceeding the budgeted goal by 108.9% and YTD exceeding the budgeted goal by 104.1%*. The additional revenue can be attributed to TSJ's stronger than budgeted Food & Beverage performance and added short-term events within the second quarter.
- During the budgeting process, it was anticipated that FY2013-2014 would be challenging primarily within the first two quarters. However, the second quarter performed better than anticipated. The business forecast was reviewed and approved by CSL the City of San Jose's third party industry advisor as part of the benchmarking study analysis.
- Contributing factors in forecasting for FY 2013-2014 included:
 - Construction and renovation within the first two quarters.
 - Clients shifting to the new expansion and a slow ramp-up of increased business related to the opening of the expansion.
 - Center for the Performing Arts closure during the first quarter related to capital improvements.
 - Slower than anticipated Association and Corporate business bookings due to the increase in transient hotel room night bookings, making it more difficult to book group business.

Expenses

- For the second quarter of Fiscal Year 2013-2014, TSJ generated an additional \$953.3k of unbudgeted operating expense when compared to budget. However, \$424.8k of the expense generated an additional \$860k in revenue.
- Details of the unbudgeted operating expenses include:
 - \$146.8k additional expense was utilized to generate \$454.8k in added Food & Beverage Revenue.
 - \$278k additional expense was utilized to generate \$405.2k in added Personnel Service Revenue.
 - \$224.8k in additional fixed labor expense to better service client needs.
 - \$67.3k added general repair & maintenance expense

Construction Related Expenses (Unbudgeted)

- First quarter, expenses of \$98,155 as a result of construction and renovation included:
 - \$29k Construction Management advocate
 - \$26k labor related to new Furniture, Fixtures & Equipment (FF&E) assembling
 - \$12k for FF&E security
 - \$12k Locks/keys due to construction access needs
 - \$6K new fire extinguishers in the expansion area not covered by the project
 - \$6k Cleaning of turned over expansion and renovation areas
 - \$9.2k R&M follow up of new area, etc.
- Second quarter, expenses of \$47.7k as a result of construction and renovation included:
 - \$33k Construction Management advocate
 - \$14k added security staff necessary due to renovation

Note: TSJ and City Oversight worked closely together to ensure the approved policies are followed related to City Council appropriation monitoring.

Gross Operating Profit (GOP) (includes TOT Revenue and Net Parking Profit)

- TSJ reported a favorable variance of \$497k to the Gross Operating Profit to budget in the second quarter, resulting in a favorable variance of \$111.9k as December 31, 2013.

Transit Occupancy Tax (TOT) – Revenue & Fund Balance

- As of December 2013, hotel revenue reported an increase of 16.5% over prior year. Hotel revenue is an important trend for the City of San Jose as there is a direct correlation to the TOT tax revenue the City earns which helps to fund critical city services.
- San Jose Hotels have experienced a 14.8% increase in hotel rate when compared to prior year.
- San Jose Hotel Occupancy also experienced an increase when compared to prior year with an average increase of 3.94% in occupancy.

Attendance, Visitor Spending & Economic Impact

- TSJ ended the second quarter with lower than projected attendance when compared to goal, coming in at 93.6%. Second quarter attendance compared to first quarter was much stronger. Year to date attendance for the period ending December 31, 2013 is 90.5% or 325k visitors to San Jose.
- The following were some of the challenges Team San Jose had to overcome:
 - Summer concerts did not occur as anticipated
 - The loss of a contracted resident arts partner event with seven TSJ performance days resulted in decreased attendance

- TSJ reported higher than anticipated Estimated Visitor Spending, reporting 107.3% of goal for the second quarter and 105.7% or \$27M in visitor spending Year to date as of December 31, 2013.

Return on Investment - ROI

- TSJ reported higher than anticipated ROI for the second quarter of \$2.36, compared to a goal of \$2.20. Year to Date as of December 31, 2013, ROI actual is \$1.84.

The formula for ROI is (TSJ Operating Revenue + TOT Revenue + Parking Revenue + Estimated visitor Spending) divided by (TSJ Operating Expense + Parking Expense + All other Fund 536 expenses with the exclusion capital spending + Debt Service).

Hotel Room Night Generation and New Bookings

- Team San Jose generated 129,319 (future) hotel room nights definite, putting Team San Jose at 149.8% of the goal for the second quarter.
 - Redeployment and restructuring of sales staff with focus on short term corporate bookings
 - Added incentives to sales team to close business within the goal timeline rather than waiting for December and June high closing months
- Team San Jose generated 149,331 (future) hotel room nights definite as a result of the above initiatives reporting 118.3% of goal year to date. Note: TSJ's performance for the first quarter was lower than anticipated as a result of clients waiting to secure their events until after the Convention Center Grand Opening to see the new facility first hand.

CUSTOMER SERVICE AND THEATER PERFORMANCE

Customer Service

Team San Jose continues to provide an online survey form that is distributed directly to the meeting planner of each event and their responses are sent directly to our contract administrator within the City of San Jose and Team San Jose Board of Directors.

- Customer survey response rates for the second quarter of 2013-2014 was 96% overall satisfaction for those responding.

Customer Testimonials from the second quarter include:

"The staff and service of this facility is top notch. The city should be most proud of that!" Exceeded expectations: Floor Manager was very helpful, as well as all waiting staff.

Google Top Contributor Summit

Event Service staff was "incredible to work with and contributed highly to the amazing success of our event. They were a dream team to work with and our entire company has raved about our company party at the Civic all week. Thank you, thank you, thank you."

Chegg Employee Event

"Event Service Manager was very responsive, the lower rating on the knowledge just comes from the fact that we were in the expansion so sometimes things needed/asked had not been done yet. He was great to work with and got things done! Banquets: Team was very good & on it!"

AMD Fusion Developers Summit

"Sales Manager was incredibly supportive, responsive and attentive to all our needs. Professional and always had a smile. Event Service Manager was my calming force. Our event is quite complex and the Event Service Manager was always there to make sure everything and all the moving parts were in order. Banquets: Very nice staff. Telecommunications staff are great people to work with and very supportive."

Cleantech Global Forum

Customer Service (continued):

“Sales Manager was great to work with and always helpful. Event Service Manager was easy to work with and quick to help with anything we needed. Banquets: Was extremely helpful and always there when we needed them for anything. Professional staff of servers were supplied with as well. Concessions: Only thing I would ask to be a little better. Was not bad but could use hot food and more selection. Cleaning: no problems at all. “

Ski and Board Festival

“Sales Manager has always been awesome! Event Service Manager and his team were wonderful to work with. Banquets: excellent job. Telecommunications: Michael was awesome.”

CSAC

Sales Manager was “very nice to work with and accommodating as it related to the contract negotiating process.” Event Service Manager was “very nice to work with and provided a great experience” Banquets was “very accommodating”

CREW

Sales Manager: “buttoned up. very pleased” Event Service Manager: “all good. very communicative” AV: “Great sound, lighting - production was top-notch and impressed our musical talent not return? if budget prohibited our return exceeded expectations.” Willingness to make our event work from the get-go. “Sales Manager was great Event Service Manager was terrific Head usher at Civic that night – great”

Mix 106.5 “A Very Merry Mixer

Theater Performance

The Downtown Theaters are an important aspect of operations and continue to be active. Overall performance is based on occupied days and performance days. Occupied days are counted from the time a customer loads in until they load out for an event and include all events. Performance days are counted as Arts and Entertainment based events in the venue, representing visitors to Downtown San Jose.

- TSJ performed flat to prior year however anticipated increases related to summer nights concerts and the cancellation of a significantly large contracted theater event resulted in the unfavorable variance for the second quarter.
- Theaters contributed 111,544 in attendance and over \$2m in economic impact in the second quarter.

NEW BOOKINGS AND CALENDAR OF EVENTS FOR THE 2nd QTR

Calendar of Events for the 2nd QTR *(Short list of major events, not all events are listed)*

- State Bar of California, October 2013, 1,000 out of town attendees, \$1.3m in economic impact
- MobleCON, October 2013, 1,400 out of town attendees, \$1.4m in economic impact
- Rock N Roll Marathon, October 2013, 16,300 out of town attendees, \$2.6m economic impact
- Harvest Festival November 2013, 11,800 total attendees, \$1.17m economic impact
- BIOMEDevice November 2013, 1,245 out of town attendees, \$865k economic impact
- ACSA Annual Convention December 2013, 600 out of town attendees, \$997k economic impact
- CSAC’s Annual Meeting, December 2013, 500 out of town attendees, \$836.4 economic impact
- AMD Fusion Summit, December 2013, 400 out of town attendees, \$576k economic impact

New Business Secured for Future Years:

- FanimeCon 2015: 7,200 room nights
- USA Taekwondo 2014 Junior/Senior Championships: 3,284 room nights
- Search Marketing Expo – SMX West: 1,415 room nights
- 2014 Atlassian Summit: 3,140 room nights
- 2015 AAAS Annual Meeting: 7,065 room nights

CALENDAR OF EVENTS FOR THE 2ND QUARTER

| Calendar of Events : Sept - Dec 2013 | | |
|---|---|----------------------|
| Start Date | Event | Projected Attendance |
| September | | |
| 09/06/13 | City of San Jose Office of Cultural Affairs presents "An Evening of Arts & Leadership" | 200 |
| 09/06/13 | Nederlander Concerts presents "The Wiggles" | 2,000 |
| 09/07/13 | Opera San Jose presents "Verdi's Falstaff" | 5,000 |
| 09/08/13 | Nederlander Concerts presents "Earth, Wind and Fire" | 2,000 |
| 09/10/13 | Energy Storage North America | 550 |
| 09/16/13 | WebTech | 945 |
| 09/18/13 | BAST New Realities Meeting | 300 |
| 09/19/13 | Airports Council International Annual Conference and Exposition | 1,800 |
| 09/19/13 | SCCAOR Tradeshow and Convention | 1,000 |
| 09/20/13 | Nederlander Concerts presents "The Price is Right" | 2,000 |
| 09/21/13 | Iglesia Ni Cristo presents "Special Gathering" | 3,000 |
| 09/25/13 | Creative Convergence Silicon Valley "C2SV" | 3,175 |
| 09/26/13 | Silicon Valley Business Journal Structures Awards | 350 |
| 09/27/13 | AAA Entertainment presents "Shreya Ghoshal" | 2,000 |
| October | | |
| 10/01/13 | TSMC Open Innovation Forum 2013 | 1,080 |
| 10/02/13 | Nederlander Concerts presents "Spank!" | 2,000 |
| 10/03/13 | Live Nation Worldwide presents "Bill Burr" | 2,000 |
| 10/03/13 | Silicon Valley Arrowfest 2013 | 1,600 |
| 10/04/13 | Rock 'n' Roll Half Marathon and Expo | 45,100 |
| 10/05/13 | San Jose Taiko 40th Anniversary | 2,500 |
| 10/07/13 | HP Security Analyst Bay Area | 940 |
| 10/09/13 | State Bar of California 86th Annual Meeting | 2,650 |
| 10/13/13 | Cruise Planners Bay Area Presents "Aegis Live" | 2,000 |
| 10/15/13 | Reverence Gospel Media presents, "I'm In Love with a Church Girl" | 900 |
| 10/16/13 | MobileCON™ 2013 | 5,100 |
| 10/20/13 | CALPERS Educational Forum | 750 |
| October | | |
| 10/24/13 | 2013 Net Impact Annual Conference | 3,000 |
| 10/24/13 | Broadway San Jose presents "Alton Brown" | 2,000 |
| 10/26/13 | West Coast Performing Arts Presenters presents "Sex Swagger and Swing: Salute to Bobby Darin, Frank Sinatra and the Rat Pack" | 2,700 |
| 10/27/13 | Nederlander Concerts presents "The Moody Blues" | 2,000 |
| 10/29/13 | Broadway San Jose presents "Priscilla Queen of the Desert" | 15,000 |
| 10/29/13 | TM Forum Digital Disruption 2013 | 1,200 |

| November | | |
|-----------------|--|----------------------|
| Start Date | Event | Projected Attendance |
| 11/02/13 | Home Show 2013 | 4,500 |
| 11/02/13 | West Coast Performing Arts Presenters presents "Alley Cats Doo Wop Show" | 600 |
| 11/04/13 | ACSA Annual Convention | 2,100 |
| 11/05/13 | CREW Silicon Valley Economic Forecast | 200 |
| 11/10/13 | AMD Fusion Developers Summit | 1,090 |
| 11/15/13 | Children's Musical Theater San Jose presents "The Wizard of Oz" | 3,600 |
| 11/16/13 | Ballet San Jose 2013 Gala with Symphony Silicon Valley | 210 |
| 11/16/13 | Marquez Brothers Public Dance | 9,700 |
| 11/16/13 | Opera San Jose presents "Humperdinck's Hansel & Gretel" | 6,500 |
| 11/17/13 | CSAC's 119th Annual Meeting | 1,200 |
| 11/19/13 | Broadway San Jose presents "Evita" | 15,000 |
| 11/20/13 | Cleantech Open 2013 Global Forum | 1,250 |
| 11/22/13 | Abilities Expo | 5,000 |
| 11/23/13 | Nederlander Concerts presents "So You Think You Can Dance" | 2,000 |
| 11/23/13 | Ski & Board Festival | 5,000 |
| 11/27/13 | Midnite & Vital Events presents "Give Thanks" | 3,751 |
| 11/29/13 | Events R Us Inc. presents "Arab Idol" | 2,600 |
| 11/29/13 | Harvest Festival ORIGINAL Art & Craft Show | 10,300 |
| December | | |
| 12/04/13 | BIOMEDevice: An MD&M Event | 3,350 |
| 12/04/13 | Nederlander Concerts presents "Wynonna and The Big Noise" | 2,300 |
| 12/06/13 | A.C.N. Leadership Meeting | 1,800 |
| 12/06/13 | Children's Musical Theater San Jose presents "White Christmas" | 3,600 |
| 12/07/13 | San Jose Dance Theatre presents the 48th Annual Production of "The Nutcracker" | 4,000 |
| 12/07/13 | San Jose Youth Symphony 2013 Holiday Performance | 450 |
| 12/07/13 | Symphony Silicon Valley presents "Kamio plays Tchaikovsky" | 2,100 |
| 12/07/13 | Turning Wheels for Kids 2013 Bike Build | 750 |
| 12/07/13 | Wealth Builders Leadership Event | 766 |
| 12/10/13 | FOCUS 2014 | 1,400 |
| 12/13/13 | Ballet San Jose presents "The Nutcracker" | 20,000 |
| 12/13/13 | Mix 106.5 - Next Media Silicon Valley presents "A Very Merry Mixer" | 1,000 |
| 12/14/13 | Golden State Cheer Competition 2013 | 1,510 |
| 12/14/13 | Nederlander Concerts presents "Legend of Zelda Season 2" | 2,000 |
| 12/14/13 | Symphony Silicon Valley presents "Carols in the California" | 700 |
| 12/15/13 | Nederlander Concerts presents "Montgomery Gentry/Charlie Daniels Band" | 2,000 |
| 12/17/13 | San Francisco 49ers Holiday Film Shoot | 10 |
| 12/28/13 | Nederlander Concerts presents "War/Tower of Power" | 2,000 |
| 12/28/13 | Symphony Silicon Valley presents "Bugs Bunny at the Symphony" | 4,000 |

SALES, MARKETING AND COMMUNICATIONS EFFORTS

Below are highlights from the second quarter sales, marketing and communications/PR activities:



Grand Opening of the New San Jose Convention Center:

Since the October 2013 Grand Opening of the new San Jose Convention Center, Team San Jose has secured 44 new pieces of business that will use the new expanded space and of these 15 are city wide conferences that fill San Jose hotels and welcome visitors to San Jose from outside the region.



Advertising Impressions (exposure):

From an advertising perspective, Team San Jose secured advertising within target meeting and convention trade media outlets through ads, website ads, direct newsletters, etc., generating year to date 456,510 million advertising impressions.



Unique Website Visits:

There were 168,601 fiscal year to date unique visits to the sanjose.org website. Unique visits is defined as a new visitor to the website within a period of time in this case, we track results on a monthly and annual basis.

Trade Shows & Special Events:

Team San Jose has participated in 21 combined industry tradeshows, sponsorships and client events – reaching out to a total of 5,905 meeting planners fiscal year to date within various market segments.



Film Office:

San Jose's Film Office acts as the City and County Film Office, fielding inquiries to permit offices within the county. Team San Jose assisted in 14 filming opportunities to promote San Jose and the region as a film destination. Film opportunities include Bizarre Foods with Andrew Zimmern, Francis Ford Coppola Winery Photo shoot, and 49'ers holiday shoot to name a few.



City National Civic Naming:



City of San Jose and Team San Jose officials -- along with country music superstar Wynonna Judd and Nederlander Concerts -- unveiled the renamed City National Civic and new marquee to rebrand the historic concert venue in December 2013. The historic San Jose Civic has been renamed the City National Civic. The press event generated 17 articles in local, trade and entertainment pubs and 3 broadcast segments (NBC, KTVU, KLIV). These articles represent over 3.7 Million impressions




Media Impressions (exposure):

Media impressions are defined as the exposure that one publication, website, magazine, newspaper, blog etc., has when an article, photo, or mention is included about the item measured. In this case, San Jose as a destination for meetings, conventions and leisure travel is what Team San Jose measures.

Through the second quarter, Team San Jose generated 94,334,961 million media impressions and 242 articles to support San Jose's destination awareness as a meetings and convention destination. This includes articles placed in meetings and convention trade publications, local and leisure publications with \$421,311.14 marketing spend equivalent.









CONVENE ON SITE



A Resized, Reimagined Convention Center in San Jose


Public Spheres: Idola Tree on the convention center plaza, left; San Pedro Square, right.



The tech wizards who established Silicon Valley and San Jose, Calif., as a center of innovation were known for mixing a laid-back vibe with brainpower. The same could be said for the San Jose Convention Center's recently unveiled renovation and expansion. The \$130-million project not only added 125,000 square feet of ballroom and meeting space, bringing the total usable space to 550,000 square feet, it retooled much of the center, opening it up to the California sunshine with thoughtfully redesigned areas that support collaboration.







Top 10 ways to spend Halloween around San Francisco



So where can Halloween-loving celebrants find places and events that will whet their appetite for fright? Follow this ghoulish top 10 list for the scariest places to go in the Bay Area for Halloween.

2. [Winchester Mystery House](#), San Jose

5. [California's Great America – Halloween Haunt](#), Santa Clara

7. [Santana Row: Mommy & Me & Daddies, Too: "Happy Halloween"](#), San Jose







CONCLUSION

Team San Jose appreciates the opportunity to present performance results to the Community and Economic Development Committee. This report has been coordinated with the City Manager's Office and is transmitted by Karolyn Kirchesler, CEO, Team San Jose.

SCHEDULE 7.4

SAMPLE CALCULATION OF INCENTIVE FEE MEASURE PERCENTAGE

| | | | | PERFORMANCE | | INCENTIVE | |
|--------------------------------|------------|------------|---|-------------|--------|-----------|--|
| GOAL | | Results | % | ACHIEVED | WEIGHT | SCORE | |
| Economic Impact | | | | | | | |
| Hotel Room Nights | 44,500 | 50,229 | | 112.9% | 10% | 11.3% | |
| Event Attendance | 441,471 | 534,270 | | 121.0% | 10% | 12.1% | |
| Estimated Impact | 25,610,986 | 29,388,514 | | 114.7% | 10% | 11.5% | |
| Return on Investment | \$ 2.90 | \$ 2.97 | | 102.4% | 10% | 10.2% | |
| Gross Operating Profit/Revenue | | | | | | | |
| Gross Operating Revenue | 6,203,823 | 8,732,663 | | 140.8% | | | |
| Gross Operating Profit | 1,809,769 | 2,584,963 | | 142.8% | 40% | 57.1% | |
| Theatre Performance | | | | | | | |
| # of Performances - TOTAL | 90% | 90% | | 100.0% | 5% | 5.0% | |
| Special Events Days - TOTAL | 8% | 8% | | 100.0% | 5% | 5.0% | |
| Customer Satisfaction | | | | | | | |
| Satisfaction Rate | 95% | 97% | | 102.1% | 10% | 10.2% | |
| | | | | | 100% | 123% | |
| | | | | | | 122% | |

SCHEDULE 9.2(a)(iii)

MAJOR CITY ECONOMIC DRIVEN EVENTS

Major City Events (potential)

The following groups are considered high profile and/or regional events that produce minimal hotel room nights and require deep discounting, free space and concessions to bring them to the Convention Center and/or Theatres managed by Team San Jose.

These groups meet one or more of the following criteria:

- Notoriety
- Potential for multi-year agreements with San Jose hotels
- Events with potential to produce group and individual leisure business
- City or State organization that San Jose partners with

Regional/High Profile Groups:

- ICMA
- The Tech Awards and The Tech Challenge
- YWCA Annual Luncheon
- Legacy for Childrens' Awards
- Children's Musical Theatre Gala
- RocknRoll Marathon
- AFP Silicon Valley Philanthropy Day
- San Jose Jazz Dinner and Silent Auction
- Harker School
- Silicon Valley Leadership Group
- Cinequest Film Festival
- Joint Venture Silicon Valley
- Techmanity
- C2SV

EXHIBIT A

CONVENTION CENTER PARKING OPERATIONS

PURPOSE

The Convention Center parking garage ("Garage") is an integral support facility to the San Jose Convention Center. The Garage frequently serves as the first impression of the City for downtown visitors, hotel guests, and convention and cultural facility attendees. Parkers expect the Garage to be clean, safe, functional and efficient; and the services provided by Garage personnel to be professional and courteous. The City of San Jose ("CITY") and Team San Jose ("TSJ") have agreed upon the following goals, performance measures, roles and responsibilities for managing the Garage.

A. GOALS AND PERFORMANCE MEASURES

1. CITY will be responsible for achieving the annual parking revenues identified in the City's Adopted Operating Budget.
2. CITY will have primary responsibility for customer service in the Garage, with support from TSJ, resulting in a ranking of 4 or better on semi-annual survey questions of Garage parking customers.

B. MANAGEMENT

1. CITY will be responsible for management of the Garage and for hiring the third party vendor appointed to manage day-to-day operations at the Garage ("Parking Operator") and to execute the contractual requirements with the Parking Operator.
2. CITY will notify TSJ in writing of its intent to exercise any options with the current Parking Operator and will invite TSJ to participate on the evaluation panel for any future request for proposal for a Parking Operator. In the event of any disagreement on the management of the Garage, the CITY retains the final authority to manage and operate the Garage, including the setting of rates and staffing schedules.
3. CITY will have primary responsibility for maintenance of the Garage. TSJ will be responsible for providing specific maintenance services listed in Section G below, for which specific identified services will be reimbursed by the CITY.
4. TSJ will designate an individual on TSJ's staff ("Parking Liaison") who will be the primary TSJ contact for parking information and requests regarding the parking requirements with the CITY and the Parking Operator. CITY will have primary responsibility for decisions regarding Garage operation.
5. CITY, TSJ, and the Parking Operator will hold weekly meetings to review the event calendar, and Garage management and operations activities. As needed, CITY will meet with TSJ to review Garage revenues and expenses.
6. CITY and TSJ will collaborate on setting parking rates on event days (excluding City sponsored events), including free or reduced parking rates for certain events. In setting rates, strong consideration will be given to the goal of activating the Convention and cultural facilities, balanced with the goal of achieving minimum parking revenues. The range of rates that can be charged will be established

through the City's Master Parking Rate Schedule Resolution.

7. Garage revenue and expenses will be applied to TSJ's Income Statement for purposes of determining the Return on Investment and Gross Operating Profit for the San Jose Convention Center.

C. EVENT PLANNING

1. TSJ will continue to provide CITY with access to the on-line Convention Center master event planning calendar ("Calendar"). The Calendar will be used to better inform parking demand forecasting, rate setting, staffing, customer service, maintenance and cleaning activities, and post-event review for the Garage. The Calendar should include at a minimum: vendor arrival and departure times; peak hour visitor arrivals and departure; total estimated vehicle occupancy by day and time; expected number of attendees, and expected number of vehicles.
2. TSJ will arrange weekly event planning meetings with the CITY and Parking Operator to review relevant event information, including, but not limited to:
 - a. type of event
 - b. schedules
 - c. estimated and actual attendance
 - d. estimated and actual parking demand
 - e. event start and end times
 - f. peak arrivals and exits
 - g. parking rate amount and type (e.g. flat)
 - h. any special parking requirements
3. To the extent possible based on the timing of actual bookings, TSJ shall make available preliminary information on future events three (3) weeks in advance of events to provide CITY and Parking Operator adequate time to develop staffing schedules and plans. Based upon adjustments to the relevant event information described in C.2 above that are provided to the CITY by TSJ prior to the event, the CITY and Parking Operator will develop modified staffing schedules and plans.
4. CITY will provide TSJ with monthly revenue and expense reports for the Garage operation by the 22nd of the following month of activity.

D. STAFFING AND OPERATIONS

1. As part of the annual Budget process, TSJ will submit to CITY an estimate of event activity for the next fiscal year by February 1 of each year. DOT and the Parking Operator will use the estimated event activity to develop a baseline staffing plan for the Garage by February 15 of each year. TSJ will review the baseline staffing plan and provide DOT with suggested modifications by March 15 of each year. Along

with the baseline staffing plan, DOT and the Parking Operator will develop a baseline overtime and contingency staffing Budget for the Garage. The protocol for the use of this funding will be developed by CITY and coordinated with TSJ staff.

2. CITY will provide TSJ with off-hour contact information for Parking Operator and CITY staff. If the overtime and contingency staffing is beyond the authority authorized in the approved event plan, assigned TSJ staff will contact the off-hour CITY or Parking Operator contacts to obtain authorization for the additional staffing. If TSJ is unable to contact CITY or Parking Operator contacts, TSJ may authorize necessary staff for the event.
3. TSJ may request that certain Parking Operator staff either be assigned or not assigned to the Garage. CITY and Parking Operator will make best efforts to accommodate any such request. CITY will be responsible for managing all parking access and revenue control systems.

E. CUSTOMER SERVICE

1. The CITY and Parking Operator will have primary responsibility, with support from TSJ, to ensure that customers receive high levels of service and are satisfied with their experience. The CITY, in conjunction with the Parking Operator, will conduct a survey of Garage customers on a semi-annual basis. The customer service survey will use a 1 to 5 scale, with 5 being the highest. Customers may be asked to rate services and conditions, such as: customer service, parking equipment reliability, signage, satisfaction with the appearance and cleanliness of the Garage, and satisfaction with Garage security.
2. The goal is to have a 4.0 or better rating for all five questions. The customer service ratings will be reviewed on an annual basis during the Budget process.

On a semi-annual basis, the CITY, TSJ and Parking Operator will evaluate the survey results, acknowledge what is working well, and recommend improvements where appropriate. Any TSJ customer service reports regarding parking will also be tabulated and shared with CITY staff.

F. SECURITY

1. TSJ will be the primary provider of security for the Garage. TSJ will provide regular security patrols for the Garage, the tunnel, and all Garage stairwells for all events and activities, except at those times and days listed in subsection F.2 below.
2. CITY will be responsible for Garage security from 9pm to 3am on Thursday, Friday and Saturday. During the designated hours, DOT will provide regular security patrols for the Garage, tunnel, and all Garage stairwells. Security costs coordinated by CITY, through the Police Garage Security Detail, or through a private contractor, will be considered as part of the overall operating expense for the Garage.
3. If the security needs in the Garage increase beyond the operational level that is being provided in FY13-14, CITY and TSJ shall meet to discuss the options to address Garage security and determine whether additional security measures should be provided, and whether the additional security will be provided by the CITY or TSJ.

If by mutual agreement, TSJ provides additional security in the Garage beyond the operational level that TSJ is providing in FY13-14, TSJ will be reimbursed for the associated costs by the CITY.

G. MAINTENANCE

CITY will be responsible for the following activities at the Garage:

1. Parking Access and Revenue Control Systems (PARCS)
2. Sweeping, scrubbing and power washing; painting; trash collection
3. Maintenance and cleaning of parking booths and offices
4. Market Street pedestrian stairwell and entranceway cleaning
5. Lighting and ballasts
6. Expansion joint repairs
7. CO² exhaust monitor testing, maintenance and repairs
8. BMS costs to run garage- related HVAC and CO² systems
9. Fire extinguisher testing and replacement
10. Interior and exterior garage signage
11. Door repairs (partial) in garage egress areas
12. Security from 9 p.m. to 3 a.m. on Thursday, Friday and Saturday.

TSJ will be responsible for the following activities at the Garage:

TSJ Financial Responsibility

1. Way finding signs and directories located in the vestibules between the parking garage and main building
2. Building Management System (BMS) testing for coordination with CO² monitors
3. Maintenance of vestibules between the exhibit halls and the Garage

If other maintenance and/or repair items arise in the Garage that are not identified in this Item G, CITY and TSJ shall meet to discuss the options to address the additional maintenance item(s), and to determine whether the maintenance and/or repair will be provided by the City and/or TSJ. If by mutual agreement, TSJ provides additional maintenance or repair of an item that is wholly, or partially, the responsibility of the CITY, CITY will reimburse TSJ for CITY's portion of the costs.

CITY Financial Responsibility

CITY will reimburse TSJ for maintenance and security costs incurred by TSJ in providing the following services related to the Garage operation. CITY will reimburse TSJ on a quarterly basis for costs incurred by TSJ during the previous quarter. As part of the annual City budget process, the CITY and TSJ shall meet by February 15 of each year to review the estimated costs for each of the following services for the upcoming fiscal year. TSJ shall notify CITY by the 10th of each month of any exhaust fan maintenance, or elevator or fire sprinkler repair costs incurred during the previous month.

1. Stairwell & emergency exit cleaning *(8 hrs per week of custodial maintenance and replacement of burned out stairwell light fixtures)*
2. Exit tunnel graffiti removal *(50% of costs)*
3. Elevator maintenance, inspections and repairs *(50% of cost for four elevators jointly serving the Convention Center and Garage)*
4. Fire sprinkler monitoring *(42% of costs for combined monitoring of Convention Center and Garage fire sprinkler system)*
5. Fire sprinkler quarterly inspections and annual test *(42% of cost for combined Convention Center and Garage fire sprinkler system)*
6. Fire sprinkler repairs and maintenance *(42% of total system cost for regular and preventive maintenance and direct costs for any Garage system repairs)*
7. Security at times other than noted as CITY responsibility *(10% of non-event security patrol for Convention Center and Garage)*
8. TSJ Parking Liaison *(\$2,500 per month plus annual 3% cost of living adjustment for the Director of Safety, Security and Parking wages, benefits, and employment taxes)*
9. Water *(Base cost of \$813 for FY13-14, adjusted annually with changes in water rates for the Convention Center)*
10. Exhaust Fan Maintenance *(100% cost for maintenance related to Garage HVAC including testing, calibration and repair of carbon monoxide detectors)*
11. Electricity *(453,766 Kwh annual usage and PG&E rates for the Garage)*

H. CAPITAL PROJECTS

1. CITY will work with TSJ to develop a comprehensive 5-Year Capital Improvement Program (CIP) for the Garage by January 15 of each year.
2. All Garage capital projects will be part of the overall 5-year CIP and will go through the normal City approval process.
3. For each capital Project, CITY will work with the Parking Liaison during the design phase to develop a detailed Project work Schedule to minimize disruption during Convention Center events.

EXHIBIT B

INSURANCE

CONSULTANT, at CONSULTANT's sole cost and expense, shall procure and maintain for the duration of this AGREEMENT insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by CONSULTANT, its agents, representatives, employees or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and
2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors & Omissions for all professional services.

There shall be no endorsement reducing the scope of coverage required above unless approved by the CITY's Risk Manager.

B. Minimum Limits of Insurance

CONSULTANT shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident; and
4. Professional Liability Errors & Omissions \$1,000,000 per occurrence/ aggregate limit.

C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by CITY's Risk Manager. At the option of CITY, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officers, employees, agents and contractors; or CONSULTANT shall procure a bond guaranteeing payment of losses

and related investigations, claim administration and defense expenses in an amount specified by the CITY's Risk Manager.

D. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverages

- a. The City of San José, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, CONSULTANT; products and completed operations of CONSULTANT; premises owned, leased or used by CONSULTANT; and automobiles owned, leased, hired or borrowed by CONSULTANT. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.
- b. CONSULTANT's insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents or contractors shall be excess of CONSULTANT's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by CONSULTANT shall not affect coverage provided CITY, its officers, employees, agents, or contractors.
- d. Coverage shall state that CONSULTANT's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- e. Coverage shall contain a waiver of subrogation in favor of the City, its officers, employees, agents and contractors.

2. Workers' Compensation and Employers' Liability

Coverage shall contain waiver of subrogation in favor of the City of San José, its officers, employees, agents and contractors.

3. All Coverages

Each insurance policy required by this AGREEMENT shall be endorsed to state that coverage shall not be suspended, voided, cancelled, or reduced in limits except after thirty (30) days' prior written notice has been given to CITY, except that ten (10) days' prior written notice shall apply in the event of cancellation for nonpayment of premium.

E. Acceptability of Insurers

Insurance is to be placed with insurers acceptable to CITY's Risk Manager.

F. Verification of Coverage

CONSULTANT shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this AGREEMENT. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov, or mailed to the following postal address or any subsequent address as may be directed in writing by the Risk Manager:

City of San José—Finance
Risk Management
200 East Santa Clara Street, 13th Floor Tower
San José, CA 95113-1905

G. Subcontractors

CONSULTANT shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

RD:EAK:RPH
01/10/2014

EXHIBIT C
EMERGENCY PROCEDURES

Emergency and Evacuation Procedures

EMERGENCY AND EVACUATION PROCEDURES

Team San Jose is committed to the safety and security of our millions of guests, clients and patrons, as well as our employees, throughout all of our venues. Safety considerations are of paramount importance to us at all times. The following Emergency and Evacuation Procedures have been created for your reference while visiting the San Jose Convention Center and Cultural Facilities.

GENERAL

The following are instructions to use during a drill or actual emergency, such as a fire, earthquake, chemical spill or bomb threat. Any emergency situation should be immediately reported to the Security Department or the nearest Team San Jose employee. When calling Security, speak calmly, state your name, give your exact location, and describe the nature of the emergency.

Security: 408-277-3500 or use a house phone and dial x3500

- Uniformed Security is available 24 hours a day, seven days a week.
- Contacting external resources should always be done by Security. Never call 911 directly.
- Any activation of the fire alarm system will be considered grounds for immediate evacuation without additional notification.
- The decision to evacuate a building will be made by the Emergency Response Team Representative (ERT) except where area supervisors determine that the danger warrants immediate removal from the area.
- Actual instructions to evacuate will come from a paging system, a megaphone, the fire alarm system or verbal/written instructions delivered to the appropriate area.

Emergency and Evacuation Procedures

- In all emergencies Security will provide the current status of the situation to the ERT, supervisors and the administration receptionist. Event Managers will notify clients as needed.
- Clients and patrons are to remain in the designated areas of safe refuge until an “all clear” has been given by the San Jose Fire Department, San Jose Police Department and/or the ERT.

PROCEDURES

MEDICAL EMERGENCY

- Contact **Security at 408-277-3500 or use a house phone and dial x3500.**
- You may also contact your designated Event Manager who will alert Security on your behalf.
- Security will immediately respond to the location of medical incident, notify any Emergency Medical Services (EMS) personnel that may be onsite and/or contact 911 if immediate emergency medical is required.

FIRE

- Report any fire or smoke to **Security at 408-277-3500 or use a house phone and dial x3500.**
- Leave the building by the closest safe exit. Do not use elevators.
- Proceed to a designated area of safe refuge. (See Evacuation Map)
- Do not return to the building until told to do so by San Jose Fire Department, Security, Event Manager or the ERT.

Emergency and Evacuation Procedures

EARTHQUAKE

- Take shelter under desk, table, work surface or other stable object.
- Face away from windows and chemical storage containers.
- Remain where you are until the shaking stops.
- After the earthquake subsides stay where you are (shelter-in-place) unless it is unsafe or you are told to evacuate the building by the ERT. Then proceed to the nearest exit. Do not use elevators.
- Proceed to designated area of safe refuge. (See Evacuation Map)
- Do not return to the building until told to do so by the ERT representative or Security.

CHEMICAL SPILL

- Report any spill to **Security at 408-277-3500 or use a house phone and dial x3500.**
- If directed to evacuate, leave the building by the closest safe exit away from the spill.
- Proceed to designated area of safe refuge. (See Evacuation Map)
- Do not return to the building until told to do so by the ERT representative or Security.

Emergency and Evacuation Procedures

BOMB THREAT

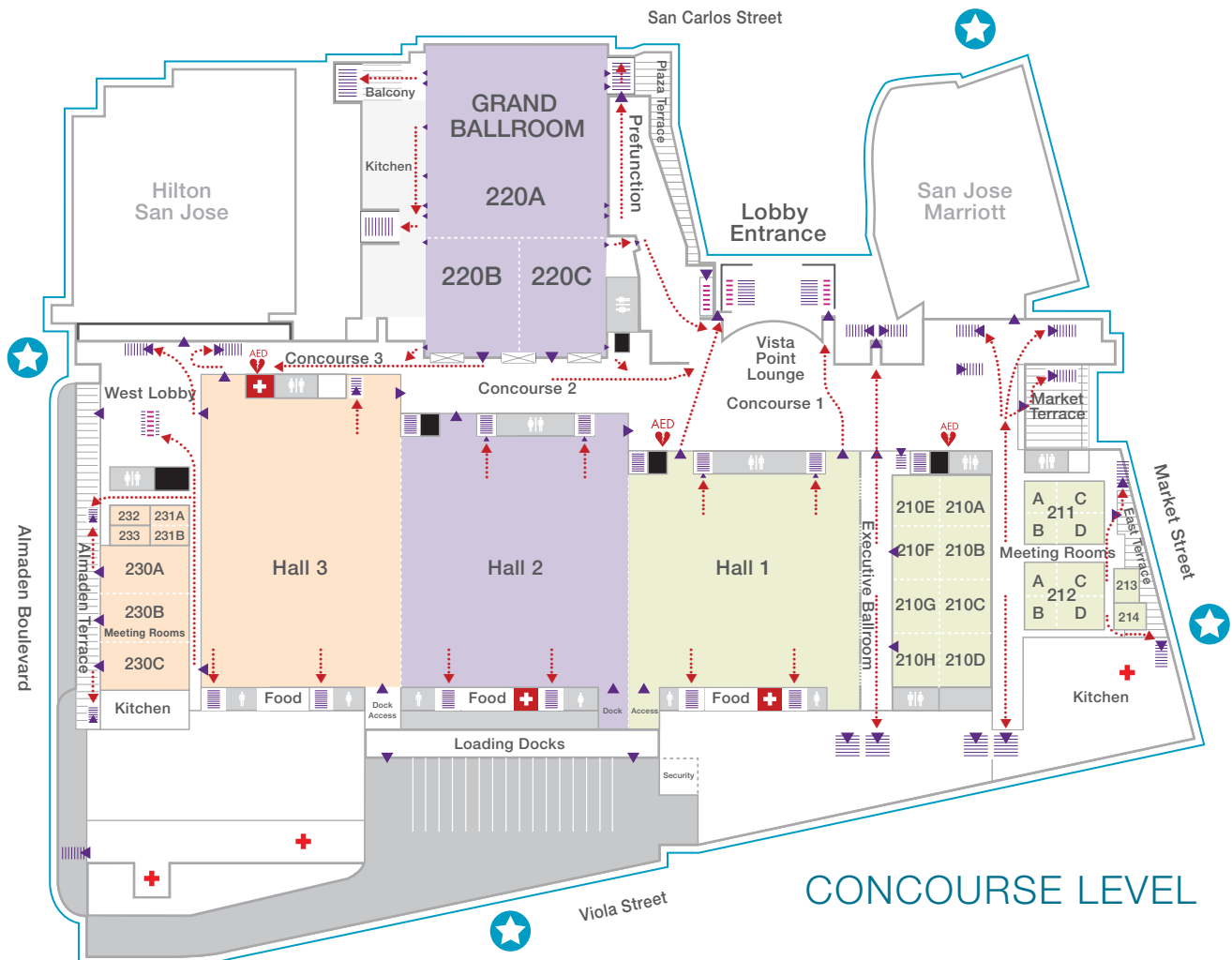
- Contact **Security at 408-277-3500 or use a house phone and dial x3500, to report any suspicious object.**
- DO NOT TOUCH IT. BOMB DISPOSAL IS THE RESPONSIBILITY OF EXPERTS ONLY!
- All Event Managers will contact clients directly and advise personnel with radios to cease all use until further notice.
- An evaluation of the threat will be made by the ERT/SJPD and a decision to evacuate the facility may be given prior to any search.

EMERGENCY COMMUNICATION PROCESS

- Prior to the start of a program, Event Managers will advise their clients of the appropriate exits to use and the location areas of safe refuge in case of an emergency.
- Event Managers will notify attendees as needed and will give instructions to evacuate to the designated areas of safe refuge.
- The ERT and/or Event Managers will physically respond to affected Convention Center locations if safe to do so.
- The ERT and/or Event Managers will monitor their radios for updates from personnel who have responded to the event.
- Once investigation is under way, megaphones will be used to advise attendees of the current situation if the PA system has not already been activated.
- Constant communication will be made to attendees advising of the current status.

Emergency and Evacuation Procedures

Convention Center Concourse Level - Evacuation Plan

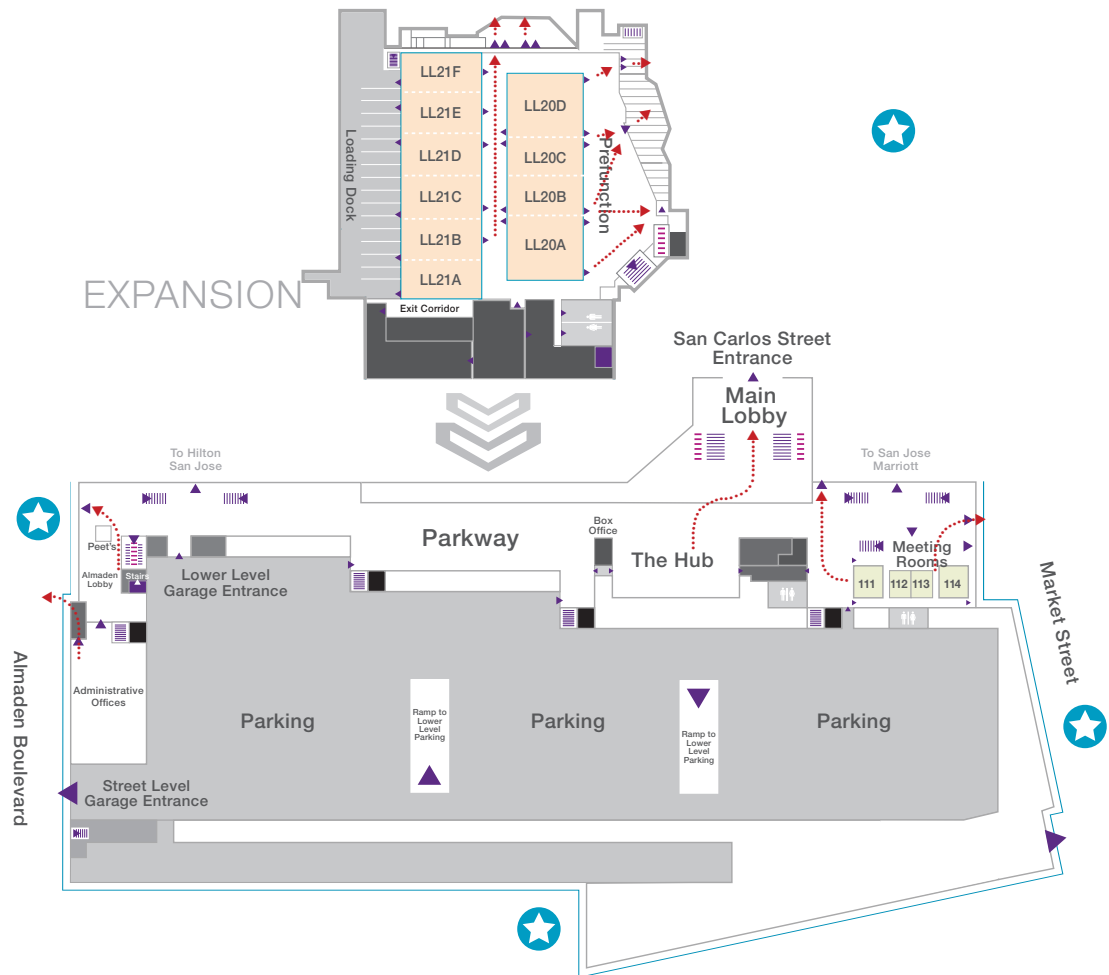


Evacuation Key

- Safe Refuge
- First Aid Kit
- First Aid Room (EMT)
- AED
- Stairs
- Escalators
- Elevators (Avoid)
- Parking

Emergency and Evacuation Procedures

Convention Center Parkway Level - Evacuation Plan



PARKWAY LEVEL

Evacuation Key

- | | |
|----------------------|-------------------|
| Safe Refuge | Stairs |
| First Aid Kit | Escalators |
| First Aid Room (EMT) | Elevators (Avoid) |
| AED | Parking |

Emergency and Evacuation Procedures

FOR YOUR INFORMATION

Emergency Facilities closest to the Convention Center and Cultural Facilities Venue

HOSPITAL

Santa Clara Valley Medical Center
751 South Bascom Avenue
San Jose, CA 95128
(408) 885-5000

O'Connor Hospital
2105 Forest Avenue
San Jose, CA 95128
(408) 947-2500

POLICE

San Jose City Police Department
(408) 299-3144

FIRE DEPARTMENT

Station 30
454 Auzerais Avenue
San Jose, CA 95126
(408) 277-4630

Station 1
1380 North 10th Street
San Jose, CA
(408) 277-4365

PHARMACY

CVS Pharmacy
821 The Alameda
San Jose, CA 95126
(408) 291-4550

Walgreens
1399 West San Carlos Street
San Jose, CA 95126
(408) 971-3098

EXHIBIT D

LABOR COMPLIANCE ADDENDUM

TO BE DETERMINED

RD:EAK:RPH
01/10/2014

EXHIBIT E
FACILITY USE AGREEMENT FORM



Facility Use Agreement

Agreement #: 24324-010
Event #: 24324
Account #: 00028987
Projected Attendance: 25

Team San Jose Meetings

Event Name: TSJ

Summary Page

Sales Mgr: Carolyn Trinh
408-792-4133
ctrinh@sanjose.org

Evt Coord: Chloe Okpiabhele
408-792-4135
cokpiabhele@sanjose.org

Contact: Sue Murphy
408-792-4169
smurphy@sanjose.org

Space Rental Charges/Event Schedule

The following function space is booked for your use for the indicated dates and times and at the specified rate.

| <u>Booked Function Space</u> | <u>Start</u> | <u>End</u> | <u>Function Description</u> | <u>Amount</u> |
|------------------------------|----------------------|-----------------------|-----------------------------|---------------|
| VIP Lounge | June 04, 2014 8:00AM | June 04, 2014 12:00PM | | \$0.00 |
| | | | Facility Use Fee: | \$0.00 |



Facility Use Agreement

Agreement #: 24324-010
Event #: 24324
Account #: 00028987
Projected Attendance: 25

Team San Jose Meetings

Event Name: TSJ

This Facility Use Agreement ("Agreement") is entered into as of the Effective Date (as defined below):

BETWEEN: Team San Jose, a California non-profit corporation
408 Almaden Boulevard
San Jose, CA 95110-2709

(Hereinafter called "Team San Jose")

AND: Team San Jose Meetings
408 Almaden Boulevard
San Jose, CA 95110

(Hereinafter called "Client")

Team San Jose and Client are sometimes referred to herein as the "parties."

In consideration of the following terms, conditions, and covenants, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Team San Jose and Client agree as follows:

AGREEMENT

1. DEFINITIONS. The capitalized terms not otherwise defined in this Agreement are defined as follows:
 - a. "City" means the City of San José, California.
 - b. "Event" means the activity described under the titles "Event Name" and "Event Schedule" set forth on the Summary Page.
 - c. "Facility" means each facility or room indicated on the Summary Page to be made available to Client under the terms of this Agreement during the Occupation Term. "Facilities" means and includes each Facility, individually and collectively.
 - d. "Occupation Term" means the period of time beginning with the earliest date listed under the heading "Event Schedule" and ending with the last date listed in the Event Schedule, all as set forth on the Summary Page, and includes any expansion of the Occupation Term as may be agreed to pursuant to the Section of this Agreement titled *License to Use and Occupy*. The original Occupation Term refers to the period originally contracted for as set forth on the Summary Page of this Agreement.
 - e. "Summary Page" means the Summary of Terms of Facility Use Agreement attached as the cover page to this Agreement.
2. LICENSE TO USE AND OCCUPY. For the sole purpose of conducting or hosting the Event, and subject to all of the terms of this Agreement, Team San Jose hereby grants to Client a limited, terminable right and license to occupy those portions of the Facilities described on the Summary Page during the dates listed under the heading "Event Schedule," as set forth on the Summary Page during the Occupation Term, including any additional dates that may be agreed to pursuant to the Section of this Agreement titled License to Use and Occupy. Client acknowledges that, while Client's use of the designated portions of the Facilities are exclusive as to the right to host the Event during the designated time and dates, such use is not exclusive as to the right of Team San Jose and its Exclusive Providers (as defined in the Section titled Exclusive Services) to have access to the Facilities at all times. Client shall also be granted non exclusive access to adjoining entrances, exits, corridors and restrooms, as designated by Team San Jose.
3. LIMITATION OF LICENSE. Notwithstanding any term hereof to the contrary, this Agreement is not intended to lease or to grant to Client any interest in the Facilities. This Agreement merely evidences Client's authorization to use the specified portions of the Facilities during the Occupation Term, subject to the terms and conditions of this Agreement. This Agreement does not grant Client the right to use or

Team San Jose Meetings

Event Name: TSJ

occupy any other portion of the Facilities or any other facility comprising the San José Convention & Cultural Facilities. Furthermore, nothing in this Agreement shall be construed to allow Client to enter into or occupy a Facility at any time other than the times set forth on the Summary Page unless authorized by Team San Jose in writing.

4. TERM. The term of this Agreement commences on the first date that both Client and Team San Jose have executed and delivered this Agreement (the "Effective Date"), and, unless earlier terminated in accordance with the Section of this Agreement titled Expiration and Termination, continues until the last day of the Occupation Term (the "Term").
5. FEES; CHARGES; PAYMENT. For the original Occupation Term, Client shall pay Team San Jose the amount(s) indicated for the Facilities as specified under the heading titled *Total Space Rental* on the Summary Page (the "Facility Use Fee"). In the event that Client fails to vacate the Facility by the last day listed, Client agrees to pay to Team San Jose an amount equal to 110% of the Daily Use Fee (without Discount), as set forth on the Summary Page, for each day or part thereof that Client remains in possession of all or any part of the designated Facility. The Facility Use Fee and any additional amounts due for use of the Facilities or equipment and/or services shall be made as follows:
 - a. The Facility Use Fee, as reduced by any potential rebates, shall be paid in accordance with the Payment Due Dates set forth on the Summary Page. If Client fails to return an executed original or counterpart of this Agreement, together with the first deposit amount of the Facility Use Fee as stated on the Summary Page, on or prior to the applicable Due Date indicated on the Summary Page, Team San Jose may withdraw the scheduled dates without notice and may book another event at the Facilities on the subject dates.
 - b. Subject to the provisions of subparagraph c. of this Section, the fees and charges incurred to obtain ancillary services as described in the Section of this Agreement titled *Ancillary Services* ("Ancillary Charges"), including, without limitation, ancillary services rendered by the Exclusive Providers described in the Section of this Agreement titled *Exclusive Services*, shall be timely paid to Team San Jose in installments in accordance with the Payment Due Dates indicated on the Summary Page.
 - c. Client acknowledges and agrees that the Ancillary Charges Deposits set forth on the Summary Page, and the timing thereof, are determined based on the estimates of Ancillary Charges provided by Client at the execution of this Agreement. Client shall submit Event specifications and requirements by the due date listed under Document Due Dates on the Summary Page for Client's Event and all final event specifications and requirements, including, without limitation, labor and ancillary services requirements, not less than 30 days prior to the first move-in date set forth on the Summary Page. Upon receipt of Client's submission of final requirements, Team San Jose shall generate a statement of estimated Ancillary Charges (the "Ancillary Charges Estimate"). Should the Ancillary Charges Estimate exceed the total Ancillary Deposits listed on the Summary Page, Client shall remit an additional Ancillary Services Deposit 7 days prior to the first move-in date set forth on the Summary Page. In the event that the actual Ancillary Charges exceed the estimated charges originally detailed on the Summary Page, as adjusted by the additional Ancillary Charges Deposit, if any, the excess will be invoiced after the Event and will be payable within ten days of delivery of such invoice.
 - d. Any payments due hereunder shall be payable in immediately available funds, and in lawful money of the United States, and shall be paid to Team San Jose, Accounts Receivable, 408 Almaden Boulevard, San José, CA 95110, or to such person or at such place as Team San Jose may designate from time to time in writing, free from all claims, demands, set-offs, and counter-claims of any kind.
 - e. Notwithstanding any term of this Agreement, in the event that Client has failed to (i) timely pay any portion of the Facility Use Fee or the Ancillary Charges or (ii) provide the final Event specifications and requirements per the Document Date Schedule, and Team San Jose receives a bona fide proposal from a third party to license the Facility space reserved for Client, as described on the Summary Page, during all or a portion of the Occupation Term herein provided, Team San Jose, in its sole and absolute discretion, may, (A) on notice to Client and without terminating this Agreement, elect to relocate Client's Event to one or more other Facilities that are part of the City of San Jose convention facilities and license the use of the Facilities herein described to such Third Party, or (B) give notice of an Event of Default.
6. REBATE. Client represents and warrants to Team San Jose that the Event will utilize all of the space outlined in the Event

Team San Jose Meetings

Event Name: TSJ

Schedule during the entire Occupation Term, and will satisfy the Minimum Food and Beverage Commitment, as well any other event minimums requirements, listed on the Summary Page under the heading "Event Minimums" (collectively the "Event Minimums") during the Occupation Term. The Minimum Food and Beverage Commitment includes Catered Food and Beverage, and excludes labor, service charge and tax. If the Event satisfies the Event Minimums and Client timely pays any and all Facility Use Fees and other charges arising under this Agreement, Team San Jose shall apply to the final invoice an amount equal to the Rebate, if any, identified under Event Minimums as set forth on the Summary Page. In the event Client fails to satisfy any one or more of the Event Minimums or fails to timely pay all amounts due to Team San Jose, Client will forfeit any right to receive all or any portion of the Rebate.

7. DISCOUNT. Client represents and warrants to Team San Jose that the Event will generate paid Minimum Traceable Room Nights (as indicated under the heading "Event Minimums" on the Summary Page) at hotels located within the City during the Occupation Term (the "Room Night Commitment"). The Discount indicated on the Summary Page under "Event Schedule," if applicable, is based upon the Room Night Commitment. In the event that actual traceable room nights attributable to the Event is less than the Room Night Commitment, Team San Jose may withdraw the Discount and increase the Facility Use Fee to reflect Team San Jose's standard published rates (without Discount) as stated on the Summary Page.
8. ADDITIONAL TERMS REGARDING FEES AND CHARGES. Amounts chargeable to Client for use of the Facilities are subject to the following additional terms:
 - a. The Food & Beverage Minimum Commitment as set forth under the heading Event Minimums on the Summary Page is Client's minimum requirement for expenditures on food & beverage during the Event, exclusive of equipment and labor costs, service charges, and taxes, and is a material inducement to Team San Jose for entering into this Agreement. The Food & Beverage Minimum Commitment does not represent the actual or maximum amount of charges that Client may incur on account of food & beverage expenditures. The actual food & beverage expenditures will be determined based on the number of attendees and the published menu prices of the items selected. If Client's proposed actual expenditures are less than the Food & Beverage Minimum Commitment, then Client must either (a) modify the type and/or number of food & beverage items to be delivered at the Event in order to cause the actual cost of food & beverage items to equal or exceed the Food & Beverage Minimum Commitment or (b) pay the Food & Beverage Minimum Commitment even though the actual charges, based on number of and price of food and beverage items delivered, is less than the Food & Beverage Minimum Commitment, and notwithstanding actual usage or consumption.
 - b. The Standard Total Facility Use Fee for contracted Facilities (without Discount) and discounts, if applicable, are based upon the Minimum Commitments listed under Event Minimums on the Summary Page. In the event that any of the actual commitments fall below the minimums listed, Team San Jose, at its sole discretion, may increase the Facility Use Fee as stated on the Summary Page to reflect Team San Jose's standard published rates.
9. ANCILLARY SERVICES. Client acknowledges that any ancillary services or equipment that are not described in the Facility Users Guide referenced in the Sections of this Agreement titled Rules and Regulations or Exclusive Services, may only be provided to Client at the Facilities either by Team San Jose or by approved independent suppliers or vendors ("independent providers"). The delivery of ancillary services or equipment is subject to Client entering into separate agreements with either Team San Jose or the relevant independent providers with respect thereto and paying additional fees, if any, for such services or equipment. All independent providers must be in good standing with Team San Jose and must agree to abide by all Team San Jose rules and regulations set forth in the Facility Users Guide. Any and all additional charges associated with ancillary services or equipment delivered to Client are the sole financial responsibility of Client, and Client agrees to timely pay all fees and charges for ancillary services and equipment and, to the extent that such services or equipment are provided by an independent provider, to indemnify, defend, and hold Team San Jose and the City harmless from any such fees and charges.
10. EXCLUSIVE SERVICES. Team San Jose reserves unto itself, or a designated service provider ("Exclusive Provider"), the right to provide certain ancillary services at the Facilities on an exclusive basis and for additional charges to be agreed to by Client. Team San Jose may change the identity of Exclusive Providers at any time, and from time to time, in Team San Jose's sole discretion. The services reserved to Team San Jose or its Exclusive Providers, include, but are not limited to, the following:



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a. Advertising Displays. Team San Jose, or the Exclusive Provider, will provide all advertising displayed in permanently mounted display cases, restrooms, and on all electronic screens and marquees and work with client to develop sponsorship and/or advertising packages based on the Event requirements. All other exterior advertising, including but not limited to banners, decals, signs, gobos, etc. are subject to space fees.

b. Food & Beverage Services. Team San Jose is the Exclusive Provider for all food and non-alcoholic beverage services and retail sale services (including, without limitation, concessions and novelties) within the Facilities. TSJ Events, LLC ("TSJ Events"), a wholly owned subsidiary of Team San Jose, is currently the Exclusive Provider of all alcoholic beverage sales within the Facilities. Any Minimum Food and Beverage Commitment, if applicable, includes Catered Food and Beverage, and excludes labor, service charge and tax. Except as provided below or as otherwise agreed by Team San Jose in its sole discretion, all food and beverage and retail arrangements must be made through Team San Jose and TSJ Events or such other provider as Team San Jose may designate. If an Event includes food and beverage exhibitors, subject to the rules and regulations established by Team San Jose from time to time, such exhibitors may only exhibit food and beverage merchandise that they would serve or produce in the ordinary course of their business. Exhibits of food and/or beverage items shall be restricted to designated areas, and such exhibits may not compete with food and beverage services offered by Team San Jose or its contractors at the Facilities, and all such Exhibits must be arranged with and approved by Team San Jose not less than 15 calendar days prior to the first day of the Occupation Term.

c. In-House Systems. VAE Corp. ("VAE") is currently the Exclusive Provider for all in-house sound and video systems that are permanently installed at the San José Convention McEnery Center and Parkside Hall and such systems are owned by TSJ or the City.

d. Network Communications Services Infrastructure & Application Services. Team San Jose, or its then current designee ("Network Provider"), is the Exclusive Provider of access to, and utilization and modification of, the network infrastructure systems, and has the exclusive right to deliver services necessary to provide internet services, as well as wired and wireless local area and wide area network connectivity services. All Client network communications services, terms of use, access and connectivity arrangements, and payments must be made through the Network Provider.

e. Parking Lots. Team San Jose, or the Exclusive Provider, will operate the City parking lots located at or around the Facilities.

f. Rigging Points. VAE is currently the Exclusive Provider for all installation and removal of rigging points for all production work within the San José McEnery Convention Center. Rigging is permitted from the "high steel" pick points only. VAE has the exclusive authority to install and remove all points used for productions. VAE may require the removal of any equipment and/or rigging design deemed unsafe or otherwise at risk.

g. Technical Inside of House Labor. All technicians, artisans and crafts persons in the entertainment industry, including live theatre, motion picture and television production, and trade shows will be supplied exclusively by the International Alliance of Theatrical Stage Employees - Local 134 (I.A.T.S.E. - Local 134). All I.A.T.S.E. - Local 134 labor requirements shall be arranged through Team San Jose or it's preferred audio/visual provider, currently VAE Corp. The payroll for I.A.T.S.E.- Local 134 personnel will be processed exclusively by Team San Jose.

h. Transportation and Dock Labor. All transportation and dock labor, including, without limitation, all labor associated with (A) the transportation and moving of equipment, materials, exhibits, and props, to and from the marshalling yard and the Facilities, and (B) the loading and unloading of equipment, materials, exhibits, and props onto and off-of the Facility docks and into the Facilities, will be supplied exclusively by the International Brotherhood of Teamsters ("Teamsters").

11. **HEALTH DEPARTMENT REQUIREMENTS.** All food and/or beverage exhibitors and/or vendors who intend to sell, prepare, or deliver food and/or beverage items at any of the Facilities shall acquire, at their sole cost and expense, a permit for such activity ("Health Permit") from the Santa Clara County Department of Environmental Health not less than three weeks prior to the Event (See www.ehinfo.org or call 408.918.3400). A copy of the Health Permit must be delivered to Team San Jose not less than two calendar weeks prior to the commencement of the Event. No food and/or beverage exhibitor or vendor will be permitted to sell, prepare, or deliver

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food or beverage items at a Facility without a valid and current Health Permit on file with Team San Jose. Team San Jose reserves the right to remove from the Facilities any exhibitor who engages in, or attempts to engage in, any activity prohibited by this Section.

12. FACILITY OWNERSHIP. The parties acknowledge and agree that the City owns the Facilities and has an insurable interest therein and with respect to any activity conducted at the Facilities. As a material inducement to Team San Jose's obligations under this Agreement, Client agrees to provide general liability insurance coverage, as described in the Section titled *General Liability Insurance*, which includes coverage of the City in the full amount of the limits described in this Agreement by either obtaining an endorsement specifically naming City as an "additional insured" or by providing a blanket endorsement which insures the interests of the City in the Facilities and under this Agreement. It is further specifically agreed that the City is a third party beneficiary of the obligations of Client under this Section and the Section of this Agreement titled *General Liability Insurance*.

13. GENERAL LIABILITY INSURANCE.

Client shall obtain and maintain throughout the Occupation Term (and any expansion thereof), at Client's sole cost and expense, a Commercial General Liability Policy of Insurance naming Client as the insured and meeting the minimum criteria set forth below. Client shall deliver a Certificate of Insurance naming Team San Jose as the Certificate Holder and Endorsement on or before the date specified on the Summary Page. The minimum general liability insurance requirements, terms, and conditions are as follows:

a. A minimum limit of liability of \$1,000,000 Combined Single Limit for Bodily Injury and Property Damage, and, at the Team San Jose's discretion, Fire Legal Liability in the amount of \$100,000.

b. Each certificate of insurance must include the name of the Event, must identify Team San Jose named as the Certificate Holder, and must be accompanied by the following endorsements:

i. **A Policy Endorsement Form listing the Team San Jose, its officers, agents, employees and volunteers, and the City of San José, its officers, agents, employees and volunteers, as additional insured;**

ii. A minimum of ten days notice of cancellation, non-renewal, or modifications resulting in reductions of the coverage amounts required herein be given to Team San Jose (and, if notice of cancellation, non-renewal or applicable modification occurs, Client must provide Team San Jose with a new Insurance Certificate showing there is in force a valid Commercial General Liability Policy in compliance with all terms of this paragraph);

iii. The insurance is primary insurance as respects any other valid and collectible insurance Team San Jose may possess, and any other insurance Team San Jose may have will be considered excess insurance only;

iv. This policy will act for each insured and additional insured as if a separate policy had been written for each. However, this will not act to increase the policy's limits of liability.

c. Any deductibles or self-insured retentions must be declared to and approved by the City of San José's Risk Manager. At the option of Team San Jose, either: (i) the insurer shall reduce or eliminate such deductibles or self-insured retentions with respect to Team San Jose, the City of San José, their officers, agents, and employees; or (ii) Client shall procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses in an amount specified by the City of San José's Risk Manager.

d. The minimum general liability insurance requirements set forth in this Section (entitled *General Liability Insurance*) do not limit the indemnification obligations of Client under the section of this Agreement titled *Indemnification* or the liability of Client under the section of this Agreement titled *Direct Liability*.

14. WORKERS' COMPENSATION INSURANCE. Client represents and warrants that it is aware of the provisions of the Labor Code of the State of California which requires every employer to be insured against liability for injury to employees or to undertake self-insurance in accordance with the provisions of the Labor Code. Client shall comply with such provisions before commencing any activities in connection with this Agreement, and shall continue to comply with such provisions throughout the Occupation Term. Concurrently with providing a Certificate of Insurance under the Section of this Agreement titled

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General Liability Insurance, Client shall provide Team San Jose with evidence that Client maintains a current policy of worker's compensation insurance meeting the minimum requirements required by law.

15. ASSIGNMENT/SUBCONTRACTING. Client shall not assign, transfer, or subcontract any right or interest in this Agreement, whether in whole or in part, to any third-party. Notwithstanding the foregoing, Client may assign this Agreement, with the prior written consent of Team San Jose, whose consent will not be unreasonably withheld, to any entity that directly or indirectly controls, is controlled by, or is under common control with Client, or to any entity which acquires all or substantially all of the assets of Client. Team San Jose may assign this Agreement to City at any time in its sole and absolute discretion.

16. INDEMNITY.

a. Client shall indemnify, defend, and hold City, Team San Jose, and their respective officers, agents, and employees (collectively the "TSJ Indemnitees") harmless from and against any and all losses, damages, claims, demands, suits, causes of action, costs, fees (including, without limitation, attorneys' fees), and liabilities (collectively "Losses") incurred, suffered, or sustained by the TSJ Indemnitees, or any of them, as a result of a Third Party Claim (as hereinafter defined) arising from (i) any act or omission, during the Occupation Term (or any expansion thereof), of Client or any of Client's officers, directors, employees, agents, contractors (including independent contractors), exhibitors, registrants, outside caterers, and Persons attending the Event (all collectively the "Client's Agents and Invitees"), (ii) the breach of any term, covenant, or condition of this Agreement by Client or any of Client's Agents or Invitees, (iii) the breach of any term, covenant, or condition of any Release of Liability agreement delivered to Team San Jose by any of Client's Agents or Invitees as a pre-condition to use the Facilities by such Person(s) (as defined below), (iv) the failure of Client to pay any amounts due to a third party for services rendered to or for the benefit of Client at the Facilities or during the Event, and (v) any judgment, award, settlement, attorneys' fees, and/or other costs or expenses incurred in connection with the defense of any actual or threatened action, proceeding, or Third Party Claim arising from the aforementioned (i) through (iii).

b. Team San Jose shall indemnify, defend, and hold Client, and Client's respective officers, agents, and employees (collectively the "Client Indemnitees") harmless from and against any and all Losses incurred, suffered, or sustained by the Client Indemnitees, or any of them, as a result of a Third Party Claim arising from (i) the gross negligence or intentional acts or omissions of Team San Jose or any of its officers, agents, contractors, or employees, during the Occupation Term (or any expansion thereof), (ii) the breach of any term, covenant, or condition of this Agreement by Team San Jose; and (iii) any judgment, award, settlement, attorneys' fees, and/or other costs or expenses incurred in connection with the defense of any actual or threatened action, proceeding, or Third Party Claim.

c. In the event of any claim giving rise to right of indemnification under this Section titled *Indemnity ("Claim")*, Team San Jose, on behalf of the TSJ Indemnitees, and Client, on behalf of the Client Indemnitees, shall have the right to approve counsel chosen by the indemnifying party to defend the Claim, which approval shall not be unreasonably withheld or delayed. In the event that a conflict arises in the defense of any Claim, Team San Jose, on behalf of the TSJ Indemnitees, and Client, on behalf of the Client Indemnitees, shall have the right to engage independent counsel at the expense of the indemnifying party.

d. Notwithstanding the terms of this Section, the remedies provided pursuant to the Section of the Agreement titled *Limitation of Liability* and the Section of this Agreement titled *Client Cancellation; Liquidated Damages* shall be the sole and exclusive remedies of the parties in the event of a Termination Breach.

e. For purposes of this Agreement, a "Third Party Claim" is any Claim asserted by a Person not a party to this Agreement. For the further purposes of this Agreement, the terms "Person" or "Persons" means any individual, limited liability company, corporation, partnership, trust, or any form of business organization, individually or collectively.

17. DIRECT LIABILITY. Client shall reimburse Team San Jose for any and all Losses suffered or paid by Team San Jose as a result of or arising from (a) the breach of any term, covenant, or condition of this Agreement by Client, (b) the breach of any term, covenant, or condition of any Release of Liability agreement delivered to Team San Jose by any of Client's Agents or Invitees as a pre-condition to use any of the Facilities by such Person(s), (c) any act or failure to act of Client or any of Client's Agents or Invitees resulting in property damage to the Facilities or any property owned or managed by Team San

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Jose or the City of San José, and/or (d) any active or passive negligence or intentional act of Client or Client's Agents or Invitees.

18. **WAIVER OF CLAIMS.** To the maximum extent permitted by law, Client hereby waives and hereby forever releases any and all claims and causes of action against Team San Jose, City, and their respective officers, agents, contractors, and employees, for loss of or damage to property and for injuries to or death of persons on or about the Facilities during the Occupation Term (and any expansion thereof) that arise in connection with the Event except to the extent arising from the negligence or willful misconduct of Team San Jose, its officers, agents, contractors, or employees.
19. **LIMITATION OF LIABILITY.** Notwithstanding anything in this Agreement to the contrary, in no event shall either party be liable for any lost revenue, or for any incidental, special or consequential damages of any kind (including lost profits), regardless of the form of action, whether in contract, tort (including negligence), or otherwise, even if such party has been advised of the possibility of such damages. Subject to the terms of the Section of this Agreement titled *Client Cancellation; Liquidated Damages*, each party's liability to the other party for termination of this Agreement for any reason, including, without limitation, termination arising as a consequence of a Termination Breach or an Event of Default, shall be limited to the amount of the Facility Use Fee paid to Team San Jose (in the case of termination by Team San Jose) or the amount of the Facility Use Fee (without Discount) payable by Client (in the case of termination by Client).
20. **INTERRUPTION OF EVENT/UNAVAILABILITY OF FACILITIES.** If (a) Team San Jose determines that closure of a Facility is necessary to protect public health, safety, or welfare, (b) practical use of a Facility by Client is prevented due to damage to the Facility, or (c) practical use of a Facility by Client is prevented due to (i) casualty, (ii) Acts of God, (iii) foreign or domestic acts of terrorism within the County of Santa Clara, national emergency, or civil disorder, (iv) recognized health threats as determined by the Center for Disease Control or local health agency, (v) disaster, (vi) fire, (vii) strikes (either actual or threatened), (viii) curtailment of transportation facilities making it impractical or impossible for at least 30% of Event attendees to attend, (ix) governmental directive to Team San Jose, or (x) other similar cause beyond the control of the parties making it, from an economic, political, personal safety, or policy basis, illegal, inadvisable, or impossible to hold the Event, provide the Facilities, or provide the services outlined in this Agreement, then Team San Jose or Client may cancel this Agreement upon notice to the other, in which case neither party shall have any claim against the other by reason of cancellation. If cancellation occurs prior to the first day of the Occupation Term, Team San Jose shall refund any part of the Facility Use Fee actually paid by the Client. If the cancellation occurs after the first day of the Occupation Term, the Facility Use Fee (as set forth on the Summary Page) shall be reduced in the same proportion which the elapsed time period bears to the total Occupation Term.
21. **EXPIRATION AND TERMINATION.**
- a. **No Breach on Termination.** This Agreement may be terminated prior to the last day of the Occupation Term ("Expiration Date") without constituting a breach of this Agreement as follows ("Termination"):
- i. By either party immediately upon the occurrence of an Event of Default (as defined below) with respect to the other party, except to the extent such Event of Default is caused by the party seeking to terminate this Agreement, by providing written notice to the other party of such termination, which notice shall describe the Event of Default giving rise to such termination;
- ii. As provided in the Section of this Agreement titled *Interruption of Event/Unavailability of Facilities*; or
- iii. Upon the mutual agreement of the parties.
- b. **Breach Upon Termination.** This Agreement may be terminated prior to the Expiration Date upon written notice by the terminating party to the other party; provided, however, any termination under this subparagraph b. shall constitute a breach of this Agreement ("Termination Breach") for purposes of applying the Section of this Agreement titled *Limitation of Liability* and the Section of this Agreement titled *Client Cancellation; Liquidated Damages*.
- c. **Effect of Expiration or Termination.** Upon the Expiration Date or a Termination of this Agreement, Client shall quit the



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Facilities and return to Team San Jose all equipment procured from Team San Jose. Client shall remove from the Facilities, or any part thereof, all of the property, goods, and effects belonging to Client or caused by Client or an invitee of Client to be brought upon each Facility premises. If any such property is not removed from a Facility by the Expiration Date, or within 24 hours following the date of Termination, as applicable, then Team San Jose may make arrangements to store the same and Client shall pay a reasonable fee for such storage, including all expenses incurred therewith; provided, however, that if Client fails to redeem such property within three business days after the Expiration or Termination, as the case may be, then Team San Jose may sell such property, in compliance with applicable laws, at auction or otherwise, for payment of said storage fees and expenses.

d. Events of Default. An event of default with respect to a party shall occur under this Agreement upon the occurrence of any of the following events (each an "Event of Default" and collectively "Events of Default"):

i. Any representation or warranty made by such party hereunder shall have been false or misleading in any material respect as of the date on which such representation or warranty was made;

ii. Such party fails to perform any material term, covenant, or condition of this Agreement to be performed by either party, and such party fails to cure the same within ten days after written notice from the non-breaching party;

iii. Such party (a) becomes insolvent, (b) takes the benefit of any present or future insolvency statute, (c) makes a general assignment for the benefit of creditors, or (d) consents to the appointment of a receiver, trustee, or liquidator of any or substantially all of its property (collectively "Insolvency"); provided, however, any such Insolvency relating to Team San Jose shall not constitute an Event of Default so long as Client is provided with reasonable assurance that the Facility will be available to Client on the dates and in the manner provided in this Agreement;

iv. Such party files or has filed against it a petition in bankruptcy under federal bankruptcy laws, or an action under any federal or state insolvency law, and said petition is not dismissed within 30 days after the filing thereof; provided, however, the filing of any such petition against Team San Jose shall not constitute an Event of Default so long as Client is provided with reasonable assurance that the Facility will be available to Client on the dates and in the manner provided in this Agreement.

22. CLIENT CANCELLATION; LIQUIDATED DAMAGES. In the event that Client elects to terminate this Agreement pursuant to the procedure for a Termination Breach, it would be impractical and extremely difficult to determine the actual damage to Team San Jose. Therefore, the parties mutually agree that the liquidated damages set forth in this Section are acceptable to each party and are a reasonable estimate of Team San Jose's losses in the event of a Termination Breach by Client. Team San Jose and Client agree that, in the event of a Termination Breach, Client shall pay to Team San Jose, concurrently with delivery of the notice of termination, the applicable one of the following amounts as liquidated damages:

a. If Client delivers to Team San Jose written notice of cancellation more than 18 months prior to the first scheduled Move-In Day (as set forth on the Summary Page), Client shall pay Team San Jose 25% of the standard Facility Use Fee (without Discount) set forth on the Summary Page;

b. If Client delivers to Team San Jose written notice of cancellation more than 12 months, but less than 18 months prior to the first scheduled Move-In Day, Client shall pay Team San Jose 50% of the standard Facility Use Fee (without Discount) set forth on the Summary Page; and

c. If Client delivers to Team San Jose written notice of cancellation of the Event less than 12 months prior to the first scheduled Move-In Day, Client shall pay Team San Jose 100% of the standard Facility Use Fee (without Discount) set forth on the Summary Page.

23. NOTICES. All notices and demands which may or are required to be given by either party to the other hereunder shall be in writing and shall be deemed to have been fully given when delivered personally, faxed, e-mailed, delivered by first-class U.S. mail (postage prepaid), or delivered by a nationally-recognized courier, such as Federal Express, to such party at the physical address, e-mail address or fax number set forth in the Summary Page, or such other address subsequently noticed in writing by either party in accordance with



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this Section titled Notices.

24. NO WAIVER.

The waiver by either party of a breach by the other party of any provision of this Agreement shall not be deemed a continuing waiver or a waiver of a subsequent breach of that or any other provisions of this Agreement.

25. CONTINUING REPRESENTATION AND COMPLIANCE.

Until Client has discharged each of its obligations under this Agreement, (i) each representation of Client shall be deemed to be reasserted as true and correct on a continuous basis by Client, and (ii) Client is deemed to represent to Team San Jose that it is at all times in compliance with all applicable terms and conditions of this Agreement.

26. CHANGE IN CIRCUMSTANCES. Client shall promptly notify Team San Jose of the occurrence of any Client Event of Default, including, without limitation, the occurrence of any material event or change in circumstances which renders inaccurate any representation or assertion made to Team San Jose or which renders Client in violation of any other term or provision of this Agreement. Likewise, Team San Jose shall promptly notify Client of any Team San Jose Event of Default or any material change in the condition or availability of the Facility, equipment, or services that Team San Jose has agreed to provide to Client under this Agreement.

27. TEAM SAN JOSE ADA RESPONSIBILITIES. Unless any non-compliance is caused by alterations or changes made by Client, including Client's agents, representatives, employees, contractors, or subcontractors, or by Client's (including Client's agents, representatives, employees, contractors, or subcontractors) negligence or willful misconduct, Team San Jose shall be responsible for compliance with Title II of the Americans with Disabilities Act ("ADA") regarding the following fixtures: (a) structural fixtures, including the Facility's elevators, and (b) any doorway of the Facility or any part of the Facility located outside of the exhibit halls and meeting rooms used by Client. Nothing herein shall create any obligation on Team San Jose not required under Title II of the ADA, including, without limitation, any retrofit or modification of such fixtures.

28. CLIENT COMPLIANCE WITH LAWS AND REGULATIONS.

a. Client ADA Responsibilities. For each Event covered by this Agreement, Client shall be responsible for complying with the ADA in connection with (i) setting up and running the Event, including, without limitation, setting up exhibits, seating, and access ways in an accessible manner and otherwise removing physical barriers created in connection with the Event, and (ii) providing auxiliary aids and services where reasonably appropriate to ensure reasonably effective communication to individuals with disabilities who attend the Event. Team San Jose's approval of any aspect of Client's activities under this Agreement shall not be deemed or construed in any way as a representation that such item, activity, or event complies with the ADA.

b. Copyright Law. No copyrighted musical composition shall be played or sung, whether amplified, televised, in the form of a mechanical recording or personal rendition, or otherwise, in connection with any use of the Facility, unless Client shall have first obtained all approvals and paid any license fee or other fee required by the copyright owner. No copyrighted written or other material shall be displayed at the Facilities without appropriate license rights with respect thereto.

c. Federal, State and Local Laws, and Rules of Team San Jose. Client shall comply, and Client shall take all reasonably necessary steps to ensure that Client's Agents and Invitees comply, with all federal, state, and local laws, ordinances, and regulations now or hereinafter in effect, and Client shall obtain all permits and licenses, bonds, and insurance required for conducting the Event. Client shall further assure that Client and Client's Agents and Invitees comply with any rules, regulations and instructions of Team San Jose regarding use of the Facility.

d. Wage and Hour Laws. Client shall comply with all laws, ordinances and regulations relating to work hours and the payment of wages which are applicable to persons who perform work as employees or contractors of Client in connection with the Client's Event, including, but not limited to, the ordinances, regulations and policies of the City of San José concerning prevailing wages and living wages. In addition, Client shall assure that all third party exhibitors and users of the Facilities with whom Client contracts with respect to the Event comply with all laws, ordinances and regulations relating to work hours and the payment of wages which are applicable to persons who perform work as employees or contractors of such third party exhibitors and users in connection with the Client's Event, including, but not limited to, the ordinances, regulations and policies of the City of San José concerning prevailing wages and living wages.



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e. Illegal Activity. No performance, exhibition, or entertainment which is illegal, shall be given or held at the Facility. Client covenants that Client, Client's Agent and Invitees shall not engage in any illegal activity or permit any of the foregoing persons to engage in any illegal activity, in connection with any performance, exhibit, or entertainment at an Event.

f. Liens. Client shall keep the Facility free of any liens arising out of any activity at the Facility or materials furnished or obligations incurred by Client in connection with any such activities. Client shall notify Team San Jose at least ten business days prior to the commencement of any work to be performed or materials to be furnished at the Facility which could give rise to any such lien, and shall post any bonds as required by Team San Jose in connection therewith. Team San Jose shall have the right to post and keep on the Facility any notices that may be required by law or which Team San Jose may deem proper for the protection of Team San Jose, the City, and/or the Facility from such liens.

g. Payment of Taxes. Client is responsible for and shall pay all Federal, State, County, and City taxes arising or assessed in connection with the Event and/or the use of the Facilities. Without limiting the generality of the foregoing, Client shall also be responsible for possessory interest taxes, if any, arising with respect to the use of the real property upon which the Facilities are located. If Client fails to pay any taxes owed in connection with the Event, Team San Jose may deduct such taxes from any amounts to be payable by Team San Jose to Client, if any, and tender them over to the proper representatives of the Federal, State, County, City, or other units of government.

29. PUBLIC SAFETY.

a. Client shall take all reasonably necessary steps to ensure that Client's Agents and Invitees (1) conduct their activities with full regard to public safety, (2) observe and abide by all applicable regulations and laws, including, without limitation, all laws relating to Hazardous Materials (defined below), now in effect or as amended or promulgated from time to time, and (3) comply with all requests by Team San Jose and duly authorized governmental agencies responsible for public safety.

b. As used herein, the term "Hazardous Material" means any substance or material which has been determined by any state, federal, or local government authority to constitute a "hazardous substance," a "hazardous material", or a "toxic material," or that is capable of posing a risk of injury or death to persons or damage to property.

30. RULES AND REGULATIONS.

Team San Jose and Client acknowledge that the Facility User's Guide (setting forth the rules and regulations for use of the Facilities) was delivered to and received by Client. Team San Jose and Client agree that, during the Term of this Agreement, they shall abide by the provisions of the Facility User's Guide, the terms of which are hereby incorporated into this Agreement by reference. Team San Jose reserves the right to change the Facility User's Guide in writing from time to time and will provide Client with such changed Guide, which shall be binding on Client.

Team San Jose and Client also acknowledge that the Audiovisual Service Standards for Outside Audiovisual Service Vendors was delivered to and received by Client. Team San Jose and Client agree that, during the Term of this Agreement, they shall abide by the provisions of the Audiovisual Service Standards for Outside Audiovisual Service Vendors, the terms of which are hereby incorporated into this Agreement by reference. Team San Jose reserves the right to change the Audiovisual Service Standards for Outside Audiovisual Service Vendors in writing from time to time and will provide Client with such changed Standards, which shall be binding on Client.

31. ATTENDANCE REPORT. Within 5 calendar days after the last day of the Occupation Term, Client shall deliver to Team San Jose a Statement of Attendance with respect to Client's Event which shall include a report of each of the following (as applicable): (a) total attendance excluding exhibitors, and (b) total Exhibitor Attendance over the entire term of the Event. For purposes of this paragraph, "Exhibitor Attendance" means each individual who staffs or attends the Event on behalf of or in connection with setting up, staffing, or tearing down an Exhibit booth, informational kiosk, or other form of presentation at the Event. The obligations under this Section shall survive the termination of this Agreement.

32. MISCELLANEOUS.

a. Consent. In the event an approval or consent of a party is required under this Agreement, such approval or consent shall be in writing and shall be executed by a person having the express authority to grant such approval or consent. Any



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Event Name: TSJ

consent or approval granted by Team San Jose to personnel or contractors operating on behalf of Client is for Team San Jose's benefit only and is not a warranty that such person is qualified to do the work specified. Unless specifically indicated otherwise, any approval or consent required of Team San Jose may be granted or withheld in the sole and absolute discretion of Team San Jose.

b. Controlling Law. Except to the extent federal law may apply, this Agreement shall be governed and construed by and according to the laws of the State of California, without regard to its conflicts of laws provisions and without regard to its provisions that construe ambiguities against the drafter.

c. Jurisdiction; Venue. The parties (i) hereby consent and agree to submit himself, herself or itself to the personal jurisdiction of the United States District Court for the Northern District of California or the courts of the State of California located in the County of Santa Clara, and (ii) agree that the state and federal courts located in the Northern District of California shall have exclusive jurisdiction with respect to any matter or dispute arising under this Agreement

d. Counterparts; Facsimile. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other parties, it being understood that all parties need not sign the same counterpart. Delivery of an executed counterpart signature page to this Agreement by facsimile or other electronic delivery shall be effective as delivery of an original counterpart signature page.

e. Entire Agreement. The parties acknowledge that there are no agreements or understandings regarding the use of the Facility, written or oral, other than this Agreement, including the Summary Page, and that this Agreement, including the Summary Page, constitutes the full and complete Agreement between the parties. This Agreement shall not be modified or amended, unless the parties each first agree to and approve of such modification or amendment in writing.

f. Headings. The section headings are not a part of this Agreement and shall have no effect upon the construction or interpretation of any part of this Agreement.

g. Severability. If any provision of this Agreement shall be held illegal, invalid, or unenforceable, in whole or in part, such provision shall be modified to the minimum extent necessary to make it or its application legal, valid and enforceable, and the legality, validity and enforceability of all other provisions of this Agreement and all other applications of such provisions shall not be affected thereby.

h. Successors and Assigns. The provisions of this Agreement shall, subject to the provisions of the Section of this Agreement titled *Assignment/Subcontracting*, apply to and bind the successors and assigns of the parties hereto.

i. Time of Essence. Time is of the essence with respect to this Agreement and each of the provisions hereof and thereof.

j. Incorporation of Summary Page; Exhibits; Schedules. The terms of the Summary Page are incorporated into this Facility Use Agreement by reference as though an original part hereof and are hereby accepted by the parties hereto. All Exhibits and Schedules attached hereto are incorporated herein by reference as though an original part hereof.

33. PHOTOGRAPHY AND RECORDINGS. Subject to Client specifically withholding its consent by so indicating below, Client hereby grants to Team San Jose authority to photograph and/or make audio or audiovisual recordings of the Event, including, without limitation, staging, attendees, decorations, and event rooms (both occupied and unoccupied), and further grants to Team San Jose authority to make commercial use of the photographs and/or recordings for purposes of marketing the San Jose Convention & Cultural Facilities; provided, however, any photographs or audiovisual recordings that include images of individuals present at the Event shall be limited to photographs or video images of groups of individuals.

Client Initials _____ Notwithstanding the foregoing, Client specifically withholds its consent to the provisions of the above Section entitled Photography and Recordings.



Facility Use Agreement

Agreement #: 24324-010
Event #: 24324
Account #: 00028987
Projected Attendance: 25

Team San Jose Meetings

Event Name: TSJ

Team San Jose and Client have executed this Agreement on the dates, set forth below.

Team San Jose Meetings

TEAM SAN JOSE

Tax ID Number

Per: **Sue Murphy, Executive Administrative Assistant**

Per: **Diana Ponton, VP Sales & Marketing**

Client Signature

Date: _____

Date: _____

EXHIBIT F

2013-2014 Adopted Operating Budget

Team San Jose/TSJ Events. LLC

Convention & Cultural Facilities Division (CCF)

| | |
|---------------------------------|-----------|
| Transient Occupancy Tax Revenue | 8,444,865 |
| Parking Revenue | 2,725,000 |

CCF OPERATIONS REVENUE

| | |
|---------------------------------|------------|
| Building Rental Revenue | 4,632,223 |
| Food & Beverage Services | 10,326,558 |
| Personnel Service Revenue | 4,805,824 |
| Commission Revenue | 887,949 |
| Telecommunications/Audio Visual | 30,000 |
| Ticketing Revenue | 198,138 |
| Other Revenue | 531,292 |
| Bad Debt Expense/Settlement | -50,004 |

| | |
|-------------------------------------|---------------------|
| Total CCF Operations Revenue | \$21,361,980 |
|-------------------------------------|---------------------|

| | |
|----------------------|---------------------|
| Total Revenue | \$32,531,845 |
|----------------------|---------------------|

COST OF SALES

| | |
|-------------------------|-------------|
| Total CCF Cost of Sales | \$6,570,774 |
|-------------------------|-------------|

| | |
|------------------|--------------|
| CCF Gross Margin | \$14,791,206 |
|------------------|--------------|

DIRECT EXPENSES

| | |
|----------------------------------|-----------|
| Variable Personnel Labor Expense | 8,266,890 |
| General Direct Expenses | 1,101,277 |
| R&M Direct Expenses | 1,053,855 |
| Utility Direct Expenses | 2,415,548 |

| | |
|-----------------------|--------------|
| Total Direct Expenses | \$12,837,570 |
|-----------------------|--------------|

INDIRECT EXPENSES

| | |
|-------------------------------|-----------|
| Indirect Personnel Expense | 4,640,775 |
| Security/Safety Expense | 64,025 |
| Other Indirect Expenses | 1,804,538 |
| Parking Expense Reimbursement | -159,996 |

| | |
|-------------------------|-------------|
| Total Indirect Expenses | \$6,349,342 |
|-------------------------|-------------|

EXHIBIT F

2013-2014 Adopted Operating Budget

| | |
|-------------------------------------|----------------------|
| TOTAL CCF OPERATING EXPENSES | \$25,757,686 |
| TOTAL CCF OPERATING NET NEED | (\$4,395,706) |
| CITY-DIRECTED EXPENSES | |
| City Use Expense | 200,000 |
| CVB Marketing Funding | 500,000 |
| Civic Auditorium Temp Cooling | 200,000 |
| Fire Insurance | 130,000 |
| Parking Operating Expenses | 1,266,742 |
| Total City Directed Expenses | \$2,296,742 |
| TOTAL EXPENSES | \$28,054,428 |
| GROSS OPERATING PROFIT | \$4,477,417 |

EXHIBIT G

INTERNET SERVICE ACCESS ADDENDUM

I. OVERVIEW

In furtherance of the terms of that certain Agreement for the Management of the San Jose Convention Center and Cultural Facilities dated _____, 2014 ("Agreement"), between Team San Jose ("TSJ") and the City of San Jose ("CITY" and collectively with TSJ, the "Parties"), TSJ is granted access to the CITY owned fiber infrastructure on the terms set forth in this Internet Service Addendum ("Addendum"). Capitalized terms used herein and not otherwise defined have the meanings set forth in the Agreement.

- A. During the entire term of the Agreement, TSJ will have a non-exclusive, non-terminable (except on termination of the Agreement), right and license to access and use:
 - CITY-owned fiber infrastructure that connects the Facilities managed by TSJ (the "SJCC Network") as appropriate for managing and operating the Facilities in the manner contemplated by the Agreement.
 - Internet bandwidth, in the amount of 2 gigabits/second, for the purposes of booking convention business, lowering operating costs, and improving competitive positioning.
- B. Except to the extent of use by licensees of the Facilities pursuant to a Facility Use Agreement with TSJ, CITY-owned infrastructure and bandwidth may not be used for private activity without written approval by the CITY.
- C. Except for amounts paid by TSJ with respect to City's third party costs of administration, maintenance, and oversight of the SJCC Network, as specifically allocated in the Approved Budget, and except as set forth in Section VI of this Addendum, TSJ's use of the SJCC Network shall be without any fee, cost, or charge whatsoever.
- D. CITY will have access to the following:
 - Data Analytics regarding usage of the infrastructure to identify and drive economic impact in key areas such as downtown San Jose.

II. TEAM SAN JOSE RESPONSIBILITIES

- A. Subject to available funding pursuant to the Approved Operating Budget:
 - TSJ is responsible for purchasing, mounting, installing, operating, repairing and maintaining the equipment connected to the SJCC Network (the "Equipment") that is necessary to enable and maintain internet access to the San Jose Convention Center and other Facilities operated by TSJ.
 - TSJ shall remove and replace or repair any non-functioning or malfunctioning Equipment within forty-eight (48) hours of receiving notice of the malfunctioning or nonfunctioning Equipment.
- B. TSJ is responsible for applicable replacement costs if the Equipment is subject to any damage, unauthorized alteration/modification/repair, abnormal use, misuse, neglect, abuse, accident, improper installation, or other acts caused by TSJ, its employees, or contractors. TSJ further agrees to indemnify and hold harmless CITY for any third party claim based on TSJ's unauthorized alteration or modification of the Equipment.

- C. TSJ shall notify CITY at least 48 hours but no more than one (1) week prior to performing any repair, maintenance or removal work on the Equipment or SJCC Network, and shall permit a representative of CITY to observe the same. The purpose of the notice is to provide CITY with the opportunity to determine if such work may impact the CITY's internet service, and/or internet service to the Convention Center or other City facilities.

D. Work Standards

- TSJ shall use and exercise due care, caution, skill, and expertise in performing any work under this Addendum, and shall take all reasonable steps to safeguard work site areas, including, without limitation, existing facilities and property. CITY shall not be held liable for any work performed by TSJ or any agent of TSJ.
- TSJ agrees to repair, to CITY's satisfaction, any Facilities, and repair or replace any equipment that CITY reasonably determines have been damaged, destroyed, defaced or otherwise injured as a result of the work performed by TSJ under this Addendum.
- If, during the term of the Agreement, the CITY Manager reasonably determines that the public health, safety, or welfare requires a modification of, or a departure from, the scope of services to be provided under this Addendum, the CITY Manager has the authority to identify, specify and delineate the modification or departure required, and TSJ shall perform the work under this Addendum in accordance with the CITY specified modification or departure.

E. Permits, Fees and Deposits

- The Parties do not anticipate that permits will be required to perform the work described in this Addendum. However, to the extent that permits are required, TSJ shall obtain all applicable permits and comply with all terms and conditions set forth in these permits, including, without limitation, allowing CITY personnel to inspect the installation of TSJ's equipment.
- TSJ shall timely pay to CITY all applicable deposit fees, permit fees, and other fees or amounts required to be paid by TSJ in connection with obtaining permits or performing work, including, without limitation, fees as required by any federal, state or local law, statute, ordinance, rule or regulation.

III. CITY RESPONSIBILITIES

A. Specific Actions.

- On or before June 1, 2014, City shall perform a Site Survey for the purpose of identifying equipment requirements.
- On or before June 10, 2014, identify and deliver to TSJ a list of required equipment to connect to the SJCC Network.

B. During the term of the Agreement, City shall:

- Implement and maintain connectivity to the SJCC Network.
- Timely provide a number of IP Addresses sufficient to allow internet connectivity by TSJ and its clients, vendors, and customers.

- Timely communicate violations of Internet Providers Terms and Conditions (Appendices 1 and 2).
- Monitor connectivity to the building demarcation point identified by CITY.

IV. PROPERTY LOCATION AND EQUIPMENT SPECIFICATIONS

- Subject to available funding in the Approved Budget, TSJ agrees to pay for all equipment required to establish connectivity to CITY infrastructure and distribute such service within the Facilities.
- TSJ shall cooperate with CITY during any installation, repair or other modification of the SJCC Network. TSJ or its representative must be physically present at the time of any installation, repair or other modification. In the event of technical problems relating to the internet service, TSJ shall ensure that CITY or its representatives have unrestricted access to the Facility areas or equipment necessary to resolve the technical problems.
- Equipment list will be identified after a site survey has been conducted by CITY.

V. INTERNET SERVICE

- A. **Level of Internet Service** - CITY shall provide Internet service of up to 2 gigabits per second. Additional bandwidth above 2 gigabits/second will need to be coordinated with and approved by CITY. TSJ acknowledges that CITY has made no warranties or representations regarding the fitness or suitability of CITY's internet service, and that any performance of work or costs incurred by TSJ to gain access to CITY's internet service by TSJ is at TSJ's sole risk.
- B. **Acceptable Use Guidelines** - TSJ shall ensure that users of internet service shall, at all times, comply with and conform their use of the internet service to the Acceptable Internet Use Terms of the internet service providers, Hurricane Electric LLC and Cogent Communications Inc. (See Appendices 1 and 2, respectively)
- C. **Maintenance and Support**
- CITY agrees to notify TSJ of planned maintenance at least 48 hours prior to performing such maintenance, and shall identify mutually acceptable maintenance windows so as to minimize client impact.
 - CITY agrees to notify timely TSJ of unplanned or emergency maintenance upon identification of such needs.
 - TSJ shall contact the CITY IT Help Desk Team at 408-793-6900 and open a ticket for issues regarding internet services relating to the SJCC Network.

VI. DISCLAIMER OF WARRANTY AND LIMITATION OF LIABILITY

- A. THE SJCC NETWORK INTERNET SERVICE ("SERVICE") IS PROVIDED "AS IS," AND NEITHER CITY NOR ITS PROVIDERS, OFFICERS, EMPLOYEES, OR AGENTS MAKE ANY WARRANTY, CONDITION OR GUARANTEE UNDER THIS ADDENDUM OR OTHERWISE WITH RESPECT TO (I) THE SERVICE OR (II) THE RESULTS TO BE OBTAINED FROM THE USE OF THE SERVICE. THE SERVICE IS ACCEPTED WITH KNOWLEDGE OF THIS WARRANTY LIMITATION. EXCEPT AS SPECIFICALLY SET

FORTH HEREIN, CITY EXPRESSLY DISCLAIMS ALL WARRANTIES, CONDITIONS OR GUARANTEES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OR CONDITIONS OF MERCHANTABILITY, NON-INFRINGEMENT, SATISFACTORY QUALITY, AND/OR FITNESS FOR A PARTICULAR PURPOSE. CITY DOES NOT MONITOR, AND DISCLAIMS ALL LIABILITY AND RESPONSIBILITY FOR, THE CONTENT OF ANY COMMUNICATION TRANSMITTED BY TSJ OR ANY THIRD PARTY, AND DISCLAIMS ALL LIABILITY AND RESPONSIBILITY FOR UNAUTHORIZED USE OR MISUSE OF THE SERVICE.

- B. WITHOUT PREJUDICE TO, OR LIMITING OF, CITY'S RIGHT TO ENFORCE TSJ'S OBLIGATIONS UNDER THIS ADDENDUM, CITY'S ENTIRE LIABILITY FOR ALL CLAIMS OF WHATEVER NATURE (INCLUDING CLAIMS BASED ON NEGLIGENCE) ARISING OUT OF THIS ADDENDUM, AND THE PROVISION BY CITY OF INTERNET ACCESS, INCLUDING, BUT NOT LIMITED TO, DAMAGE TO REAL PROPERTY, SHALL BE LIMITED TO REPAIR OF THE INTERNET ACCESS AND THE DAMAGED PROPERTY, IF ANY.
- C. TSJ RECOGNIZES THAT THE INTERNET CONSISTS OF MULTIPLE PARTICIPATING NETWORKS THAT ARE SEPARATELY OWNED AND NOT SUBJECT TO CITY'S CONTROL. TSJ AGREES THAT CITY SHALL NOT BE LIABLE FOR DAMAGES INCURRED OR SUMS PAID WHEN THE SERVICE IS TEMPORARILY OR PERMANENTLY UNAVAILABLE DUE TO THE MALFUNCTION OR CESSATION OF INTERNET SERVICES BY NETWORK(S) OR INTERNET SERVICE PROVIDERS NOT SUBJECT TO CITY'S CONTROL, OR FOR TRANSMISSION ERRORS IN, CORRUPTION OF, OR THE SECURITY OF, TSJ OR ANY THIRD PARTY DATA CARRIED ON SUCH NETWORKS OR THROUGH SUCH INTERNET SERVICE PROVIDERS. CITY SHALL HAVE NO LIABILITY HEREUNDER FOR DAMAGES INCURRED OR SUMS PAID DUE TO ANY FAULT OF TSJ OR ANY THIRD PARTY, OR BY ANY HARMFUL COMPONENTS (E.G. COMPUTER VIRUSES, WORMS, COMPUTER SABOTAGE, AND 'DENIAL OF SERVICE' ATTACKS). CITY IS NOT LIABLE FOR ANY BREACH OF SECURITY ON THE SJCC NETWORK, REGARDLESS OF WHETHER ANY REMEDY PROVIDED IN THIS ADDENDUM FAILS OF ITS ESSENTIAL PURPOSE. TSJ AGREES THAT IT WILL NOT HOLD CITY RESPONSIBLE FOR ANY SELECTION OR RETENTION OF, OR ACTS OR OMISSIONS OF, THIRD PARTIES IN CONNECTION WITH THE SERVICE (INCLUDING THOSE WITH WHOM CITY MAY CONTRACT TO OPERATE THE SERVICE), OR HOLD A THIRD PARTY RESPONSIBLE FOR ANY SELECTION OR RETENTION OF, OR THE ACTS OR OMISSIONS OF, CITY IN CONNECTION WITH THE SERVICE. WITHOUT LIMITING THE FOREGOING, TSJ AGREES THAT IT WILL NOT HOLD CITY RESPONSIBLE FOR (A) THIRD PARTY CLAIMS AGAINST CITY FOR DAMAGES, (B) LOSS OF OR DAMAGE TO TSJ'S RECORDS OR DATA OR THOSE OF ANY THIRD PARTY, OR (C) LOSS OR DAMAGE TO TSJ ASSOCIATED WITH THE INOPERABILITY OF THE EQUIPMENT OR APPLICATIONS WITH ANY COMPONENT OF THE SERVICE OR THE SJCC NETWORK.
- D. NEITHER CITY NOR ANYONE ELSE INVOLVED IN CREATING, PRODUCING, DELIVERING (INCLUDING SUSPENDING OR DISCONTINUING SERVICES) OR

SUPPORTING THE SERVICE SHALL BE LIABLE TO TSJ, ANY REPRESENTATIVE, OR ANY THIRD PARTY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES ARISING OUT OF THE SERVICE OR ANY INABILITY TO USE THE SERVICE, INCLUDING, WITHOUT LIMITATION, LOST REVENUE, LOST PROFITS, LOSS OF TECHNOLOGY, RIGHTS OR SERVICES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER UNDER THEORY OF CONTRACT OR TORT (INCLUDING NEGLIGENCE, STRICT LIABILITY OR OTHERWISE).

- E. NO ACTION OR PROCEEDING AGAINST CITY MAY BE COMMENCED BY THE TSJ MORE THAN ONE (1) YEAR AFTER THE LAST DAY ON WHICH THE SERVICE WHICH IS THE BASIS FOR THE ACTION IS RENDERED, AND TSJ ACKNOWLEDGES THAT THIS LIMITATION CONSTITUTES AN EXPRESS WAIVER OF ANY RIGHTS UNDER ANY APPLICABLE STATUTE OF LIMITATIONS WHICH WOULD OTHERWISE AFFORD ADDITIONAL TIME FOR SUCH A CLAIM.

APPENDIX 1

[RESERVE FOR COGENT COMMUNICATIONS AGREEMENT]



Optical Internet

**PRODUCT RIDER –
DEDICATED INTERNET ACCESS
GLOBAL**

This product rider (Rider) amends the CSA entered into between Customer and COGENT for the Services specified therein. Unless otherwise defined herein, capitalized or defined terms in the CSA have the same meaning in this Rider. In the event of a conflict between forms, the following will be the order of priority: First, the Order Form; Second, this Rider; Third, the Terms; and Fourth, the SLA.

1. Service and Options

Within the scope of the Dedicated Internet Access Service, COGENT transmits IP-packets between the COGENT Network and associated networks of its Customers as well as to and from the global Internet using COGENT's settlement-free peering agreements with other networks.

Subject to their availability, Customer may select one or more options associated with the Service such as listed in the Order Form, in which case Customer agrees to pay the related fees such as indicated in the Order Form:

MultiBGP: Customer may connect to COGENT's network with multiple BGP sessions over a single port, such BGP sessions being on its own assigned AS (the Primary ASN) and ASs from third parties represented by Customer (the Secondary ASNs). In this case, Customer will be required to provide COGENT with a Letter of Authorization ("LOA") issued by the third parties having registered the Secondary ASNs in order to activate such Service, and all interactions, being during provisioning or operations, related to BGP-sessions set up between COGENT's network and Secondary ASNs will be handled exclusively between COGENT and Customer. The fact that a BGP session is being set up between COGENT and other parties represented by Customer does not constitute a contractual relationship between COGENT and the other parties, this interaction is ruled by the contractual relationship established between COGENT and the Customer. COGENT will charge an additional Monthly Fee for each Secondary ASN connected.

Pull Traffic (available for NetCentric customers only): When the "Pull Traffic" Option is selected on the Order Form, Customer agrees that the Base Monthly Fee and Burst Fee set forth in the Order Form are discounted rates and that Customer's eligibility for these rates is contingent upon the ratio of Customer's Inbound Traffic Volume (traffic flowing from Cogent's network to Customer's network over the Service Interfaces) to Customer's Outbound Traffic Volume (traffic flowing from Customer's network to Cogent's network over the Service Interfaces) exceeding 1 (one) (the "Traffic Ratio") in each calendar month of Service. For any calendar month where the Traffic Ratio does not exceed 1 (one), (a) COGENT will assess, and Customer agrees to pay, an Overage Charge equal to the difference between the "Standard Base Monthly Fee per Mbps" set forth in the Order Form and the discounted Base Monthly Fee, and (b) the Burst Fee for any burstable usage (measured in Mbps) in such month shall be charged at the "Standard Burst Fee per Mbps" set forth in the order form, not the discounted Burst Fee per Mbps. Both the Overage Charge and the Burst Fee will appear on Customer's next invoice. For purposes of this option, "Traffic Volume" shall mean actual data transfer across the Service Interfaces, as measured by Cogent for each traffic direction, taking data transfer usage samples every 5 minutes throughout the month for each Service Interface (a sample is based upon the average bytes per second across the 5-minute segment multiplied by the 5-minute sample interval to come to the total number of bytes transferred in the segment) and adding up all samples per direction.

Equipment: COGENT may, at its sole discretion and if available, provide equipment for certain Services. The fees for such equipment as agreed in the Order Form will be added to Customer's invoice. COGENT does not guarantee and is not responsible for any specific type of equipment, or any equipment at all, to be made available to Customer, and such equipment will belong to Customer upon receipt. Customer will provide its own technical support to install, maintain, and integrate equipment. COGENT will not provide on-site technical support. Customer will be responsible for applicable replacement costs if the equipment is subject to any damage, unauthorized alteration/modification/repair, abnormal use, misuse, neglect, abuse, accident, improper installation, or other acts caused by Customer, its employees, contractors, or any other person. Such action or inaction may void any manufacturer warranties. Customer further agrees to indemnify and hold harmless COGENT for any third party claim based on Customer's unauthorized alteration or modification of the equipment. COGENT is not responsible for Service disruptions caused by any request by Customer to relocate equipment.

Expedite Delivery: COGENT's installation guarantee is strictly limited to the installation guarantee stated in the SLA. However, Customer may request in the Order Form an expedited delivery for his Service. COGENT will use commercially reasonable efforts to accommodate Customer's request; provided, however, that COGENT does not guarantee that any such request will be fulfilled (and any such guarantees given either orally or in writing are hereby disclaimed) nor does COGENT guarantee that the Service will be delivered on a specific date, such as the Requested Service Date indicated on the Order Form.

2. Burstable Service

If Customer is purchasing COGENT's burstable Service, Customer will have a minimum bandwidth commitment assigned for a given port (the Bandwidth Commitment or Committed Data Rate, "CDR"). The Bandwidth Commitment is agreed upon in the Order Form and is the minimum amount of bandwidth that will be charged to Customer each month at the base Service price, even if not fully used by Customer during a given month. Customer may burst up to the maximum bandwidth that can be carried on a given port, e.g. 1,000 Mbps for a Gig-Ethernet port, subject to availability of bandwidth within the COGENT network.

If Customer exceeds the Bandwidth Commitment on any burstable port in any given calendar month, Customer agrees to pay the additional per Mbps charge for excess bandwidth usage over the Bandwidth Commitment as indicated in the Order Form. Such excess bandwidth usage is calculated by COGENT as the difference between total bandwidth usage and Bandwidth Commitment, where total bandwidth usage is determined by collecting bandwidth usage samples every 5 minutes throughout the month for each port (a sample is based upon the average usage across the 5-minute segment) and determining the appropriate percentile (90th or 95th) of usage as indicated in the Order Form. Only one sample is captured for each 5-minute period, even though two samples are collected - one for inbound utilization and one for outbound utilization. The higher of the two samples is retained. For partial months, the total number of samples for the calendar month is used; for samples where there is no usage, 0 is the recognized value. For example, in a 30-day billing period, 8,640 samples are collected (12 samples/hour x 24 hours/day x 30 days) and listed from highest to lowest. In case of 95th percentile billing, the highest 5% or 432 samples are discarded (representing the top 5% of usage levels). The highest remaining sample (sample 433 in this example) is used to determine total bandwidth usage. For 90th percentile billing, the highest 10% or 864 samples are discarded (representing the top 10% of usage levels). The highest remaining sample (sample 865 in this example) is used to determine total bandwidth usage.

Under the "Summed Burst Billing" option available in conjunction with 90th percentile burst billing, COGENT calculates excess usage as the difference between the sum of total bandwidth usage and the sum of Bandwidth Commitment across all summed ports. For example, if Summed Burst Billing is applied over three ports with a Bandwidth Commitment of 200 Mbps on each (i.e., a total Bandwidth Commitment of 600 Mbps) and the individual 90th percentile total bandwidth usage amounts were 70 Mbps, 150 Mbps and 500 Mbps, the excess bandwidth usage would be 120 Mbps (70 + 150 + 500 - 600).

Under the "Aggregate Burst Billing" option available in conjunction with 95th percentile burst billing, excess bandwidth usage is calculated by COGENT as the difference between total aggregated bandwidth usage and the summed Bandwidth Commitment across all aggregated ports, where total aggregated bandwidth usage is determined by adding usage samples every 5 minutes across all aggregated ports. For example, if there are three aggregated ports, every 5 minutes three inbound samples and three outbound samples are collected, added up to one bandwidth usage value per direction, and the higher of the two values is retained. In a 30-day billing period, the final 8,640 retained bandwidth usage values reflect the aggregated usage across all ports. These values are listed from highest to lowest. The highest 5% or 432 values are discarded (representing the top 5% of usage levels). The highest remaining value (value 433 in this example) is used to determine total aggregated bandwidth usage.

Under both "Summed Burst Billing" and "Aggregate Burst Billing" options, a Master Service is defined in the Order Form, and all other Services involved in a Summed or Aggregate calculation are listed. Excess bandwidth usage (burst usage) calculated across the listed ports will be billed on the Master Service account. The relevant data (additional per Mbps charge for excess bandwidth usage and Billing Currency) pertaining to the Master Service will be used for calculating excess bandwidth usage fees across Master Service and all other involved Services. For example, if a customer orders ports in the UK, US, and Canada and defines the US port as the Master, all excess bandwidth usage will be billed on the US invoice in US dollars, at the burst fee indicated on the US port order form.

3. Customer's Duties to Cooperate

Customer or its representative must cooperate with COGENT in the installation process, which includes accurate completion of an Order Form containing detailed demarcation information and other onsite contact listings, and of the necessary technical questionnaires (IP Questionnaire, BGP Questionnaire, etc.) as provided by COGENT. Customer or its representative must be physically present at the time of installation. During installation and at all other times, the Customer will allow access and if necessary provide escort, for COGENT's or its representatives' necessary personnel to perform the installation and maintenance of the Service, to the designated building's phone closet(s) or telecommunications room or to the Customer's premises for the purposes of survey, installation, operations and maintenance of the Service, after prior arrangement between the parties. Customer's failure to cooperate shall release COGENT from its obligations pertaining to the Installation Guarantee included in the SLA but shall not suspend the Service Date or billing start date.

In the event of technical problems relating to the Service, the Customer will ensure that COGENT's or its representatives' service engineers have unrestricted access to the designated building's phone closet(s) or telecommunications room or to the customer premises equipment. Customer's failure to provide access shall release COGENT from its obligations pertaining to the Network Availability part of the SLA.

4. Demarcation Point

Within a COGENT data center: If Service delivery takes place within a COGENT data center, COGENT will deliver the Service at a demarcation point situated on the COGENT equipment. COGENT will provide, maintain and operate the necessary wiring ("Cross-Connect") for Customer to connect to COGENT's service at the indicated demarcation point. COGENT will provide such Cross-Connect for the fee set forth on the Order Form.

Within a third-party data center: If Service delivery takes place within a third party data center (i.e. that is not owned and/or operated by COGENT), COGENT will deliver the Service at a demarcation point situated on the COGENT equipment. Unless otherwise agreed, Customer will at its own cost provide, maintain and operate the necessary wiring ("Cross-Connect") to connect to COGENT's service at the indicated demarcation point. If Customer and COGENT agree that COGENT shall provide such Cross-Connect, then COGENT will provide such Cross-Connect against fees such as indicated on the Order Form and the Service demarcation point will remain on the COGENT equipment.

Within an On-Net corporate building: If Service delivery takes place within an On-Net corporate building, COGENT will deliver the Service at a demarcation point situated on the COGENT equipment within the Customer's suite. COGENT will provide, maintain and operate the necessary wiring ("Riser") between the building entry and the indicated demarcation point.

At an Off-Net Customer Location: Off-Net Services are being delivered to the Customer Location indicated in the Order Form through a third-party local loop to be provisioned by COGENT on behalf of Customer. As such, the Customer and COGENT agree that the charges set forth in the Order Form for such Service assumes that such Service will be terminated at a pre-established demarcation point or minimum point of entry (MPOE) in the building housing the Customer Location, as determined by the local access provider. COGENT may charge Customer additional nonrecurring charges not otherwise set forth herein for such Service where the Customer or local access provider determines that it is necessary to extend the demarcation point or MPOE through the provision of additional infrastructure, cabling, electronics or other materials necessary to reach the Customer Location. It shall be the Customer's responsibility to allow access to the facility for the local access provider, as well as to facilitate or coordinate with the property owner at the Customer Location, all additional space and electricity determined by the local access provider to be necessary to provide the Service. COGENT will notify Customer of any additional non-recurring charges, if any, as soon as practicable after COGENT is notified by the local access provider of the amount of such charges. From time to time, COGENT may provide, and Customer may accept, budgetary estimates for the extension of the demarcation point to the Customer Location along with the initial Order Form. These estimated costs may be based on certain known costs or typical installations that do not require extraordinary efforts by the provider to extend the service. In the event actual costs exceed the budgetary estimate, Cogent will notify the Customer as outlined above.

In addition, the charges and the Term set forth in the Order Form for the Service assumes that such Service can be provisioned by COGENT through the local access provider selected by COGENT (and/or Customer) for the stated Term. In the event COGENT is unable to provision such Service through the selected local access provider or the selected local access provider requires a higher cost or longer Service Term than that set forth in the Order Form, COGENT reserves the right, regardless of whether COGENT has accepted the Order Form, to suspend provisioning of the Service hereunder and notify Customer in writing of any additional non-recurring charges, monthly recurring charges and/or Term that may apply, or to cancel the Service set forth on the Order Form. Upon receipt of such notice, Customer will have five (5) business days to accept or reject such changes. If Customer does not respond to COGENT within the five (5) business day period, such changes will be deemed rejected by Customer. In the event Customer rejects the changes (whether affirmatively or through the expiration of the five (5) business day period) or if COGENT elects to cancel the Service ordered herein, the affected Service will be cancelled without cancellation or termination liability of either party.

Accepted and agreed to:

CUSTOMER:

By: _____

Title: _____

Date: _____

COGENT COMMUNICATIONS

By: _____

Title: _____

Date: _____



Optical Internet

**NETWORK SERVICES
ADDENDUM
NORTH AMERICA**

This addendum (Addendum) amends the CSA entered into between Customer and COGENT for the Services specified therein. Unless otherwise defined herein, capitalized or defined terms in the CSA have the same meaning in this Addendum. In the event of a conflict between forms, the following will be the order of priority: First, the Order Form for a particular Service; Second, this Addendum; Third, the Terms; Fourth, the SLA and Fifth, the applicable Product Rider.

Terms Sec. 2.2 Section 2.2 of the Terms, third and fourth sentences, are deleted in their entirety.

Terms Sec. 4.4 Section 4.4 of the Terms, first sentence, is deleted in its entirety.

Terms Sec. 6.1 Section 6.1 of the Terms is deleted and replaced by "INTENTIONALLY DELETED".

Terms Sec. 7.3 Section 7.3 of the Terms, first sentence, is amended by striking "District of Columbia" and replacing with "State of California".

Section 7.3 of the Terms, second sentence, is amended to read:

"Any action arising out of or related to this Agreement shall be brought in the State or Federal courts located in Santa Clara County, California, and each party consents to the jurisdiction and venue of such courts for such actions."

**Product Rider –
Dedicated Internet
Access – Global**

Section 1 of the Product Rider, fifth paragraph "Equipment", last sentence, is deleted in its entirety..

Accepted and agreed to:

CUSTOMER:

By: 

Title: *Purchasing Officer*

Date: *5/31/12*

San Jose 052312

COGENT COMMUNICATIONS, INC.

By: 

Title: *CRO*

Date: *5/25/12*

APPROVED AS TO FORM


Brian Doyle
Senior Deputy City Attorney
City of San Jose



Optical Internet

NETWORK SERVICES TERMS & CONDITIONS NORTH AMERICA

1. SERVICES AND TERM.

1.1. Pursuant to the CSA, Cogent will provide the Services to Customer for the Service charges. Customer's signature on the Order Form or use of the Service or COGENT Network constitutes its acknowledgement and agreement to be bound by the CSA. Capitalized terms are defined at the end of these Terms.

1.2. Each Service's Initial Term is indicated on the applicable Order Form. Customer will be deemed to have accepted the Service as of the Service Date. At the end of the Initial Term, the CSA will renew for successive Renewal Terms equal in length to the Initial Term unless and until terminated as provided herein.

1.3. Customer may order additional Services or locations in North America through additional Order Forms, which will be governed by this CSA. Customer's account must be current in order to make changes to Services or order additional Services.

2. SERVICE CHARGES AND BILLING.

2.1. Service charges are on the Order Form and do not include applicable Taxes unless so indicated. New services or upgrades/relocations will result in additional fees/charges. If a prior Service location remains installed after a new Service location is installed, Customer will be responsible for Service charges for both Service locations until terminated as provided for each Service.

2.2. Invoices are sent monthly in advance. Customer agrees to pay all charges and applicable Taxes for the Service upon receipt of the invoice without counterclaim, set-off or deduction. A late charge shall be added to Customer's past due balance of the lesser of 1.5% per month or the maximum legal rate. COGENT may change the specifications, Terms or charges for the Service for any upcoming Renewal Term by providing Customer at least sixty (60) days advance written notice. Customer agrees that its obligation to pay service charges and Taxes under this CSA shall survive the termination of the CSA.

2.3. Customers claiming tax exemption must provide COGENT with a properly executed exemption form.

3. SERVICE USE AND INTERRUPTION.

3.1. Customer's use of COGENT's Services or Network may only be for lawful purposes and must comply with COGENT's AUP. Transmission of any material in violation of any law, regulation or the AUP is strictly prohibited. Access to other networks connected to COGENT's Network must comply with such other networks' rules. Only Customers whose service location (as set forth on the Order Form) is a COGENT-owned or carrier neutral data center may resell COGENT's Dedicated Internet Access Service (but not any other Service offered in such location). Customers located in any other service location may not resell their Service, in whole or in part.

3.2. COGENT's obligations and Customer's exclusive remedies for failure of COGENT's Network or any Service are stated in the COGENT SLA.

4. TERMINATION, RESTRICTION OR SUSPENSION.

4.1. Prior to the Service Date, COGENT may terminate the CSA if not approved by COGENT corporate management (including credit check). COGENT also may restrict, suspend or terminate the CSA, Customer's use of or access to any Service, or both, at any time if (a) Customer is in material breach of the CSA (including but not limited to the AUP) and, in COGENT's sole judgment, an immediate restriction or suspension is necessary to protect the COGENT Network or COGENT's ability to provide services to other customers; or (b) Customer's account is unpaid sixty (60) days after date of invoice; or (c) COGENT facilities at

Customer's location are unavailable, (i.e., no connectivity and building access).

4.2. Either Party may terminate the CSA: (a) at the end of an Initial Term or Renewal Term by providing the other Party with at least thirty (30) days prior written notice (notices provided during a monthly Renewal Term will not be effective until the end of the next month (i.e., notice received April 20th is effective June 1st); or (b) except as otherwise stated herein, during an Initial Term or Renewal Term if the other Party breaches any material term or condition of this CSA and fails to cure such breach within thirty (30) days after receipt of written notice of the same.

4.3. If a Service is terminated prior to the Service Date, Customer shall pay COGENT for all Initial Costs for such Service. If the Service is terminated after the Service Date, Customer shall pay COGENT (a) for the Service up through the date of termination; and (b) except in the case of termination by Customer as provided in Section 4.2 above, or by COGENT due to loss of connectivity or building access at Customer's building(s) under Section 4.1(c) above, the Initial Costs (unless already paid) and the Termination Charge. Customer acknowledges that because actual damages to COGENT caused by early termination of a Service order are uncertain and would be difficult to determine, the Termination Charge is a reasonable liquidated damage and is not a penalty. Any reconnections of the Service shall result in additional reconnection charges to Customer at COGENT's then-prevailing rates.

4.4. If Customer defaults in any of its payment obligations under the CSA, Customer agrees to pay COGENT's reasonable expenses, including but not limited to legal and collection agency fees, incurred by COGENT in enforcing its rights. All termination notices by Customer must be sent separately for each Service (including terminating one Service location after a Service is switched to a new Service location) and must be sent to terms@cogentco.com.

5. DISCLAIMER OF WARRANTY AND LIMITATION OF LIABILITY.

5.1. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, THE SERVICES ARE PROVIDED "AS IS," AND NEITHER COGENT NOR ANY OF ITS PROVIDERS, LICENSORS, OFFICERS, EMPLOYEES, OR AGENTS MAKES ANY WARRANTY, CONDITION OR GUARANTEE WITH RESPECT TO THE SERVICES OR AS TO THE RESULTS TO BE OBTAINED FROM THE USE OF THE SERVICES, UNDER THIS CSA OR OTHERWISE. THE SERVICES ARE PURCHASED WITH KNOWLEDGE OF THIS WARRANTY LIMITATION. COGENT EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, CONDITIONS OR GUARANTEES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO ANY WARRANTIES OR CONDITIONS OF MERCHANTABILITY, NON-INFRINGEMENT, SATISFACTORY QUALITY, AND/OR FITNESS FOR A PARTICULAR PURPOSE. COGENT DOES NOT MONITOR, AND DISCLAIMS ALL LIABILITY AND RESPONSIBILITY FOR, THE CONTENT OF ANY COMMUNICATION TRANSMITTED BY CUSTOMER OR OTHERS, AND DISCLAIMS ALL LIABILITY AND RESPONSIBILITY FOR UNAUTHORIZED USE OR MISUSE OF THE SERVICES.

5.2. WITHOUT PREJUDICE TO OR LIMITING OF COGENT'S RIGHT TO RECEIVE PAYMENT FOR SERVICES, COGENT'S ENTIRE LIABILITY FOR ALL CLAIMS OF WHATEVER NATURE (INCLUDING CLAIMS BASED ON NEGLIGENCE) ARISING OUT OF THIS AGREEMENT AND ALL OTHERS BETWEEN CUSTOMER AND COGENT, AND THE PROVISION BY COGENT OF FACILITIES, TRANSMISSION, DATA, SERVICES OR EQUIPMENT INCLUDING, BUT NOT LIMITED TO, DAMAGE TO REAL/PERSONAL PROPERTY, SHALL NOT EXCEED THE LESSER OF (A) THE AMOUNT PAID BY CUSTOMER FOR THE SERVICE AT ISSUE IN THE PRIOR SIX (6) MONTHS TO THE ACTION GIVING RISE TO THE CLAIM, OR (B) ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) IN TOTAL; PROVIDED, HOWEVER, THAT THE FOREGOING LIMITATIONS SHALL NOT APPLY FOR DEATH OR PERSONAL INJURY CAUSED BY COGENT, OR FOR ANY

OTHER LIABILITY WHICH MAY NOT BE EXCLUDED OR LIMITED UNDER APPLICABLE LAW.

5.3. CUSTOMER RECOGNIZES THAT THE INTERNET CONSISTS OF MULTIPLE PARTICIPATING NETWORKS THAT ARE SEPARATELY OWNED AND NOT SUBJECT TO COGENT'S CONTROL. CUSTOMER AGREES THAT COGENT SHALL NOT BE LIABLE FOR DAMAGES INCURRED OR SUMS PAID WHEN THE SERVICES ARE TEMPORARILY OR PERMANENTLY UNAVAILABLE DUE TO MALFUNCTION OF, OR CESSATION OF, INTERNET SERVICES BY NETWORK(S) OR INTERNET SERVICE PROVIDERS NOT SUBJECT TO COGENT'S CONTROL, OR FOR TRANSMISSION ERRORS IN, CORRUPTION OF, OR THE SECURITY OF CUSTOMER INFORMATION CARRIED ON SUCH NETWORKS OR INTERNET SERVICE PROVIDERS. COGENT SHALL HAVE NO LIABILITY HEREUNDER FOR DAMAGES INCURRED OR SUMS PAID DUE TO ANY FAULT OF CUSTOMER OR ANY THIRD PARTY, OR BY ANY HARMFUL COMPONENTS (SUCH AS COMPUTER VIRUSES, WORMS, COMPUTER SABOTAGE, AND 'DENIAL OF SERVICE' ATTACKS). COGENT IS NOT LIABLE FOR ANY BREACH OF SECURITY ON THE CUSTOMER'S NETWORK, REGARDLESS OF WHETHER ANY REMEDY PROVIDED IN THIS CSA FAILS OF ITS ESSENTIAL PURPOSE. CUSTOMER AGREES THAT IT WILL NOT HOLD COGENT RESPONSIBLE FOR ANY SELECTION OR RETENTION OF, OR THE ACTS OR OMISSIONS OF, THIRD PARTIES IN CONNECTION WITH THE SERVICES (INCLUDING THOSE WITH WHOM COGENT MAY CONTRACT TO OPERATE THE SERVICES), OR HOLD A THIRD PARTY RESPONSIBLE FOR ANY SELECTION OR RETENTION OF, OR THE ACTS OR OMISSIONS OF, COGENT IN CONNECTION WITH THE SERVICES. WITHOUT LIMITING THE FOREGOING, CUSTOMER AGREES THAT IT WILL NOT HOLD COGENT RESPONSIBLE FOR (A) THIRD PARTY CLAIMS AGAINST CUSTOMER FOR DAMAGES, (B) LOSS OF OR DAMAGE TO CUSTOMER'S RECORDS OR DATA OR THOSE OF ANY THIRD PARTY, OR (C) LOSS OR DAMAGE TO CUSTOMER ASSOCIATED WITH THE INOPERABILITY OF CUSTOMER'S EQUIPMENT OR APPLICATIONS WITH ANY COMPONENT OF THE SERVICES OR THE COGENT NETWORK. CUSTOMER AGREES TO MAKE ALL CLAIMS RELATED TO THE SERVICES DIRECTLY AGAINST COGENT, AND WAIVES ANY RIGHT TO RECOVER DAMAGES (DIRECTLY OR BY INDEMNITY) RELATED TO THE SERVICES BY CLAIMING AGAINST OR THROUGH A THIRD PARTY TO THIS CSA.

5.4. NEITHER COGENT NOR ANYONE ELSE INVOLVED IN CREATING, PRODUCING, DELIVERING (INCLUDING SUSPENDING OR DISCONTINUING SERVICES) OR SUPPORTING THE SERVICES SHALL BE LIABLE TO CUSTOMER, ANY REPRESENTATIVE, OR ANY THIRD PARTY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES ARISING OUT OF THE SERVICES OR INABILITY TO USE THE SERVICES, INCLUDING, WITHOUT LIMITATION, LOST REVENUE, LOST PROFITS, LOSS OF TECHNOLOGY, RIGHTS OR SERVICES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER UNDER THEORY OF CONTRACT OR TORT (INCLUDING NEGLIGENCE, STRICT LIABILITY OR OTHERWISE).

5.5. NO ACTION OR PROCEEDING AGAINST COGENT MAY BE COMMENCED BY THE CUSTOMER MORE THAN ONE (1) YEAR AFTER THE LAST DAY ON WHICH THE SERVICE WHICH IS THE BASIS FOR THE ACTION IS RENDERED, AND CUSTOMER ACKNOWLEDGES THAT THIS LIMITATION CONSTITUTES AN EXPRESS WAIVER OF ANY RIGHTS UNDER ANY APPLICABLE STATUTE OF LIMITATIONS WHICH WOULD OTHERWISE AFFORD ADDITIONAL TIME FOR SUCH A CLAIM.

6. INDEMNITY.

6.1. Customer will indemnify, defend and hold harmless COGENT and its directors, officers, employees, affiliates, and its agents and subcontractors from and against any claims, suits, actions, and proceedings from any and all third parties, and for payment of any Losses, to the extent such Losses arise (a) as a result of non-compliance by Customer with its obligations under the CSA; (b) from any and all claims by any of Customer's customers or other third party end users in connection with a Service (including, without limitation, any claims regarding content transmitted using a Service or violation of data protection legislation), regardless of the form of action, whether in contract, tort, warranty, or strict liability; provided, however, that Customer will have no obligation to indemnify and defend COGENT against claims for damages for bodily injury or death caused by COGENT's gross negligence or willful misconduct; or (c) from claims of copyright infringement and all manner of intellectual property claims, defamation claims, claims of publication of obscene,

indecent, offensive, racist, unreasonably violent, threatening, intimidating or harassing material, and claims of infringement of data protection legislation, to the extent such Losses are based upon (i) the content of any information transmitted by Customer or by any of Customer's customers or authorized end users, (ii) the use and/or publication of any and all communications or information transmitted by Customer or by any of Customer's customers or authorized end users, or (iii) the use of Service(s) by Customer in any manner inconsistent with the terms of this CSA, including without limitation the AUP.

7. ADDITIONAL PROVISIONS.

7.1. Except as to payment obligations of Customer, neither Party shall have any claim or right against the other Party for any failure of performance due to Force Majeure.

7.2. Neither Party is the agent or legal representative of the other Party, and this CSA does not create a partnership, joint venture or fiduciary relationship between COGENT and Customer. Neither Party shall have any authority to agree for or bind the other Party in any manner whatsoever. This CSA confers no rights, remedies, or claims of any kind upon any third party, including, without limitation, Customer's subscribers or end-users.

7.3. This CSA for Service is made pursuant to and shall be construed and enforced in accordance with the laws of the District of Columbia without regard to its choice of law principles. Any action arising out of or related to this CSA shall be brought in the District or Federal courts located in the District of Columbia, and Customer consents to the jurisdiction and venue of such courts.

7.4. Notices, if required, must be sent in writing by e-mail, courier or first class mail (postage prepaid) to the appropriate contact point listed on the Order Form, and are considered made when received at that address; provided, that termination notices to COGENT must be sent in accordance with Section 4.4 above. In the event of an emergency, COGENT may only be able to provide verbal notice first; such verbal notice will be followed by written notice. Customer is responsible for accuracy of its information on the Order Form, including points of contact.

7.5. Customer may not assign this CSA without COGENT's prior written consent, which consent shall not unreasonably be withheld. Any such assignment without COGENT's prior written consent shall be void.

7.6. Without limiting any other obligation which expressly survives the expiration or prior termination of the term of the CSA, the expiration or prior termination of the term of the CSA shall relieve both Parties of any further obligations hereunder, except with respect to the Sections 2, 3, 4.3, 4.4 and 5 through 7, which shall survive any expiration or termination of these Terms.

7.7. If (but only if) required by COGENT's or Customer's agreement with Customer's Landlord: (a) any cessation or interruption in COGENT's Service does not constitute a default or constructive eviction by Customer's Landlord, and (b) Customer agrees to waive and release Landlord and its related parties from any liability in connection with any damages whatsoever incurred by Customer, including lost revenues, which arise, or are alleged to arise, out of any interruption of or defect in the COGENT Service, **REGARDLESS OF WHETHER SUCH INTERRUPTION OR DEFECT IS CAUSED BY THE ORDINARY NEGLIGENCE (BUT NOT THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT) OF A RELEASED PARTY.**

7.8. The COGENT Network is owned by COGENT, or its licensors, and is protected by copyright and other intellectual property laws. Customer agrees that title to and ownership of the Services, in any form, shall at all times and in any event be held exclusively by COGENT. Customer shall be entitled to only such rights with respect to the Services as are specifically granted herein.

7.9. This CSA and such other written agreements, documents and instruments as may be executed in connection herewith are the final, entire and complete agreement between Customer and COGENT and supersede all prior and contemporaneous negotiations and oral representations and agreements, all of which are merged and integrated into this CSA.

7.10. This CSA and any Addendum thereto may be executed in one or more counterparts all of which taken together shall constitute one and the same instrument.

DEFINITIONS

| | |
|---------------------------|---|
| AUP | COGENT's Acceptable Use Policy as posted by COGENT (currently at http://www.cogentco.com/htdocs/policy.php) COGENT reserves the right to amend its AUP at any time, effective upon posting on the COGENT website. |
| COGENT | Cogent Communications, Inc. or its subsidiaries or affiliates. |
| COGENT Network | The telecommunications network and network components owned, operated or controlled by COGENT, including COGENT's fiber backbone, metropolitan fiber networks, any equipment connected to such fiber, and the software, data and know-how used by COGENT to provide the Services. Where COGENT services a building through its own facilities, the COGENT Network includes those facilities. The COGENT Network does not include customer premises equipment, customer-ordered telephony circuits, and any networks or network equipment not operated and controlled by COGENT. |
| Customer | Customer identified in the attached Order Form. |
| CSA | The entire Customer Subscriber Agreement between COGENT and Customer for provision of the Service, consisting of the Order Form, the Terms, the applicable product rider and the SLA. |
| Equipment | Customer's equipment, if any. |
| Force Majeure | Causes beyond a Party's control, including but not limited to: acts of God; fire; explosion; vandalism; cable cut; storm; flood or other similar occurrences; any law, order, regulation, direction, action or request of any government, including federal, state, provincial, municipal and local governments claiming jurisdiction over a Party or the Service, or of any department, agency, commission, bureau, corporation, or other instrumentality of any such government, or of any civil or military authority; national emergencies; unavailability of materials or rights-of-way; insurrections; riots, terrorist acts or wars (declared/undeclared); or strikes, lock-outs, work stoppages, or other labor difficulties, supplier failures, shortages, breaches or delays. |
| Initial Costs | Greater of (a) installation fees (if not paid); or (b) all third-party costs and charges incurred by or charged to COGENT on behalf of Customer for the Service, including but not limited to local loop fees, cross-connect charges, and wiring fees. |
| Initial Term | Initial length of term for the Services as indicated on the Order Form. |
| Landlord | Customer's landlord, building owner or property/telecom manager. |
| Losses | Costs, fees, liabilities, losses, damages or penalties, including reasonable legal fees. |
| Order Form | Cover form to which these Terms are attached, identifying the specific Service(s) to be delivered. |
| Party or Parties | COGENT and/or Customer. |
| Renewal Term | Subsequent length of term for the Services after completion of the Initial Term. |
| Service(s) | Bandwidth services provided by COGENT under the Customer Subscriber Agreement. |
| Service Date | Earlier of date on which (a) COGENT deems that the Service is available for Customer's use at either the COGENT-defined demarcation point or last-available test point; or (b) Customer first uses the Service or the COGENT Network. |
| SLA | The Service Level Agreement as posted by COGENT (currently at www.cogentco.com) for Customer's specific Service(s). COGENT reserves the right to amend the Service SLAs at any time, effective upon posting on the COGENT website. |
| Space | Rented rack space from COGENT, if any. |
| Tax or Taxes | All taxes arising in any jurisdiction, including without limitation all: sales, use, excise, gross receipts, value added, access, bypass, franchise, telecommunications, property (for co-location customers), consumption, or other taxes, fees, duties, charges or surcharges (however designated) which are imposed on or based on the provision, sale or use of the Service(s), including such taxes imposed directly on COGENT or for which COGENT is permitted to invoice Customer in connection with COGENT's performance under the CSA. Taxes do not include COGENT's income taxes. |
| Termination Charge | Single payment equal to any third-party cancellation charges and the total remaining dollar value of the applicable Service order through the Initial Term or Renewal Term, as applicable. |
| Terms | Terms and conditions that apply to the Services COGENT provides to Customer. |

APPENDIX 2

[RESERVED FOR HURRICANE ELECTRIC LLC AGREEMENT]

ORIGINAL

Hurricane Electric, LLC
760 Mission Court
Fremont, CA 94539
Telephone 510 580 4100

Internet Services Agreement

This Internet Services Agreement (the "Agreement") is between Hurricane Electric, LLC, a Limited Liability Company of the State of Nevada ("Hurricane") and the City of San José, a Municipal corporation of the State of California ("Customer"), and consists of (i) this document and (ii) the Customer's Quotation of Services (see Exhibit A). Once executed by both parties, this Agreement is effective as of the Effective Date shown below.

Definitions. As used in this Agreement, "Service" means the provision of bandwidth for the transmission of data to and from the Internet through the Network, as further defined in this Agreement and in the Exhibit A ("Quote(s)"). "Network" means the network of routers, switches and communication channels that are owned or controlled by Hurricane. The Quote is attached and marked as Exhibit A. Customer and Hurricane may enter into subsequent Quote(s), which will automatically become part of this Agreement. "Hurricane Equipment" means all computer equipment, software, networking hardware or other materials belonging to or furnished by Hurricane. Additional terms are defined in the Hurricane Terms and Conditions, below. Hurricane will begin installation and Service only after it receives and accepts: (i) the Quote; (ii) this Agreement signed by a Customer authorized representative; and (iii) the Initial Payment due under Section 1.1 of this Agreement. "Personnel" refers to employees, representatives, agents, contractors, or subcontractors.

1. Service Fees And Billing. Customer agrees to pay the monthly charges for Service, the activation and other charges indicated in Exhibit A or otherwise due hereunder (collectively, "Service Charges"). Service Charges do not include applicable taxes, shipping charges (if any), or telephone company charges, all of which shall be billed in addition to the Service Charges (or billed by third party providers) and shall be the responsibility of the Customer.

1.1 Initial Payment. Upon Hurricane's acceptance of the Quote and full execution of this Agreement, Customer shall be invoiced for all Service Activation Charges and the first month's Service Charges which shall be due upon installation, but in no event later than thirty (30) days after the execution of this Agreement.

1.2 Recurring Charges. Hurricane will bill Customer monthly in advance for committed bandwidth and monthly in arrears for any additional bandwidth used above the committed bandwidth billed in the prior month. Additional bandwidth will be billed in 0.1(tenth) Mbps increments. "Bandwidth Fees" is defined as charges for usage of bandwidth provided under this Agreement as set forth in the Quote. Billing for monthly Service Charges will begin on the earlier of: (a) the Installation Date, which shall be thirty (30) business days after the Effective Date set forth above or (b) the date that Customer places Customer Equipment in Hurricane's premises. If, however, Customer is unable to use the Services commencing on the Installation Date due solely to delays caused by and within the reasonable control of Hurricane, then the date on which monthly Service Charges billing begins will be extended by one day for each such day of delay.

1.3 Payment. All Service Charges and other fees will be due in U.S. dollars within thirty (30) days of the date of invoice.

1.4 Bandwidth Measurement. Bandwidth usage will be calculated by Hurricane using the 95th percentile of samplings taken at 5 minute intervals on a monthly basis. Samples are taken by Hurricane via SNMP from the Hurricane switch or router port Customer is directly connected to and are the greater of input or output bits per second. 95th percentile is determined by sorting the sample data from smallest to largest and discarding the top 5 percent, with the remaining largest sample designated as the 95th percentile.

2. This paragraph intentionally deleted.

2.1 Acceptable Use Guidelines. Customer will at all times comply with and conform its use of the Service to the Hurricane Acceptable Use Guidelines (set forth at Hurricane's website), as updated from time to time. In the event Customer violates Hurricane's Acceptable Use Guidelines, Hurricane will provide notice and opportunity to cure, if and to the extent Hurricane deems practicable, depending on the nature of the violation and availability of the Customer. Hurricane, in its reasonable discretion, may re-enable the Service upon satisfaction that all violations have ceased and with adequate assurance that such violations will not occur in the future.

2.2 Updates. Hurricane may update the Hurricane Acceptable Use Guidelines from time to time by posting such updates on Hurricane's website. References herein to the Hurricane Acceptable Use Guidelines shall mean the most updated version of such policies or procedures posted on Hurricane's web site. Hurricane shall notify Customer in writing of any material changes to its policies and procedures and Customer shall have the right to immediately terminate the Agreement if Customer does not agree to the changes to Hurricane Acceptable Use Guidelines.

2.3 Illegal Use. Customer will cooperate in any investigation of Customer's alleged illegal use of Hurricane's facilities or other networks accessed through Hurricane. Additionally, Hurricane may modify or suspend Customer's Service in the event of illegal use of the Network or as necessary to comply with any law or regulation, including the Digital Millennium Copyright Act of 1998, 17 U.S.C. 512, as reasonably determined by Hurricane.

2.4 Address Space. Hurricane will assign IP addresses to Customer based upon ARIN guidelines. Addresses assigned to Customer by Hurricane may only be used while a Hurricane customer. If Customer has a valid address allocation from ARIN, RIPE, or APNIC, Customer may request Hurricane to announce it via BGP at no additional charge.

3. Local and Long Distance Carriers. Customer is responsible for ordering, maintaining, terminating and paying for any data and telecommunications circuits provided to Customer by local and long-distance carriers including cross-connects from Hurricane.

4. Other Networks. Customer is responsible for paying any fees, obtaining any required approvals and complying with any laws or usage policies applicable to transmitting data beyond the Network and/or through other public and private networks. Hurricane is not responsible or liable for performance or non-performance of such networks or their inter-connection points.

5. Resale. In the event Customer resells connectivity to the Internet (a) Customer remains responsible to Hurricane for all of its obligations hereunder including but not limited to all Service Charges and liabilities arising out of or related to such third party usage, sites, communications, and the acts and omissions of such third party, (b) Customer shall indemnify Hurricane for any third party claims arising out of the acts and omissions of such third party; and (c) Customer and the party(s) to whom Customer resells any portion of the Services enter into written agreement(s) pursuant to which such party(s) agree to be bound by all terms and conditions in this Agreement as applicable to them and their use of the Services and the Network. Any such resale agreement shall terminate automatically upon expiration or termination of this Agreement. Notwithstanding the foregoing, Hurricane is not liable to any third party resale customer for any claims, losses or damages, (including consequential damages) resulting from that customer's use of the Service.

6. Limited Service Level Agreement. Hurricane will use its commercially reasonable efforts to minimize Excess Packet Loss and Latency and to avoid Downtime, as more fully set out below.

6.1 Packet Loss and Latency. Hurricane does not proactively monitor the packet loss or transmission latency of specific customers. Hurricane does, however, proactively monitor the aggregate packet loss and transmission latency within its LAN and WAN. After discovering or being notified by Customer of packet loss in excess of one percent (1%) ("Excess Packet Loss") or transmission latency in excess of 120

milliseconds round-trip time based on Hurricane's measurements ("Latency") between any two routers within the continental United States portion of the Network, Hurricane will use commercially reasonable efforts to determine the source of such Excess Packet Loss or Latency and to correct such problem to the extent that the source of the problem is on the Network.

6.2 Remedy for Failure. If after two (2) hours of discovering or being notified of any Excess Packet Loss or Latency on the Network and Hurricane fails to remedy such Excess Packet Loss or Latency, Hurricane will credit Customer's account the pro-rata Bandwidth Fees for such continuous Excess Packet Loss or Latency that follows the initial two (2) continuous hours, provided that all such credits will not exceed an aggregate maximum credit of Bandwidth Fees otherwise due from Customer for one (1) calendar month for failures in any one (1) calendar month.

6.3 Inability to Access the Internet (Downtime). Customer shall be able to transmit and receive information from the Network to other portions of the Internet without Downtime (as defined below) 99.95% of the hours as an average calculated over each calendar year. "Downtime" shall be defined as Customer experiencing sustained packet loss in excess of fifty percent (50%) based on Hurricane's measurements. If Customer experiences Downtime in excess of two (2) continuous hours, then Hurricane will credit a Customer's account the pro-rata Bandwidth Fees for such Downtime, provided that all such credits will not exceed an aggregate maximum credit of Bandwidth Fees otherwise due from Customer for one (1) calendar month for failures in any one (1) calendar month.

6.4 Customer Must Request Credit. Customer must notify Hurricane within five (5) business days from the time Customer becomes eligible to receive a credit under this Section 6 to receive such credit. Failure to comply with this requirement will forfeit Customer's right to receive a credit.

6.5 Limitation on Remedies. If Customer is entitled to multiple credits under this Section 6, such credits shall not be cumulative beyond a total of credits for one (1) calendar month in any one (1) calendar month in any event. Hurricane will not apply a credit under Section 6.2 for any Excess Packet Loss or Latency for which Customer received a credit under Section 6.3. Hurricane's suspension or modification of Service in accordance with the terms of this Agreement shall not be deemed to be a failure of Hurricane to provide adequate Service levels under this Agreement. Hurricane's failure to comply with the terms and conditions of this Section 6 shall constitute a material breach of this Agreement.

7. NO WARRANTY. EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE SERVICES ARE PROVIDED ON AN "AS IS" BASIS, AND CUSTOMER'S USE OF THE SERVICES AND THE COLOCATION SPACE ARE AT CUSTOMER'S OWN RISK. HURRICANE DOES NOT MAKE, AND HEREBY DISCLAIMS, ANY AND ALL OTHER EXPRESS AND IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT AND TITLE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. HURRICANE DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE, OR COMPLETELY SECURE.

8.. Hurricane does not and cannot control the flow of data to or from the Network and other portions of the Internet. Such flow depends in large part on the performance of Internet services provided or controlled by third parties. At times, actions or inactions caused by these third parties can produce situations in which Customer connections to the Internet (or portions thereof) may be impaired or disrupted. Hurricane cannot guarantee that such situations will not occur and, accordingly, Hurricane disclaims any and all liability resulting from or related to such events. In the event that Customer's use of the Service or interaction with the Internet or such third parties is causing harm to or threatens to cause harm to the Network or its operations, Hurricane shall have the right to suspend the Service. Hurricane shall restore Service at such time as it reasonably deems that there is no further harm or threat of harm to the Network or its operations.

9. Insurance. None.

10. Limitation of Liability. NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING WITHOUT LIMITATION DAMAGES RELATED TO LOST PROFITS, TOLL FRAUD, LOSS OF USE, AND LOSS OF DATA, OR FAILURE TO REALIZE SAVINGS OR BENEFITS) ARISING UNDER THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH LOSS. THE TOTAL AGGREGATE LIABILITY OF HURRICANE, ITS SUPPLIERS, LICENSORS, AFFILIATES, DIRECTORS, OFFICERS, AND/OR EMPLOYEES UNDER OR IN CONNECTION WITH THIS AGREEMENT WILL BE LIMITED TO PROVEN DIRECT DAMAGES NOT TO EXCEED AMOUNTS ACTUALLY PAID BY CUSTOMER TO HURRICANE FOR SERVICE DURING THE 12 MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE CIRCUMSTANCES GIVING RISE TO THE FIRST CLAIM FOR DAMAGES UNDER THIS AGREEMENT.

11. Indemnification.

11.1 Both parties agree to defend, indemnify, and hold harmless the other party, and its directors, officers, employees, and agents harmless against and for all losses, causes of action, liability, costs, expenses, claims and damages, including expenses of litigation, reasonable attorney's fees and court costs, that such party may at any time suffer or sustain or become liable for, due to (i) injury or death of a person, or for damage to any tangible property, arising out of the Services caused in whole, or in part, by the negligence or willful misconduct of the other party; (ii) the party's breach of any material term, provision, or warranty contained in this Agreement; or (iii) any violation by the party, its employees, agents, or representatives, of any laws, regulations, or ordinances governing performance hereunder.

12. Term. This Agreement will commence on the Effective Date and shall expire at the end of the last "Term" specified in any Quote, unless sooner terminated as provided in Section 13 below, provided, however, that each Quote shall automatically renew for additional periods of the same length as the initial Term upon the end of its Term unless one party provides the other written notice that it is terminating such Quote not more than ninety (90) days and not less than thirty (30) days prior to the end of the Term specified in the Quote or the then current term.

13. Termination.

13.1 Nonpayment. Hurricane may suspend Service to Customer if any amount due hereunder is not paid in full within fifteen (15) days after Customer is sent an overdue notice. To reinstate Service, Hurricane will require a reconnection fee of \$500.00. Hurricane may terminate this Agreement (or at its option, only the relevant Quote) if any amount due hereunder is not paid in full within thirty (30) days after Customer is sent an overdue notice.

13.2 Bankruptcy. Either party may terminate this Agreement upon written notice to other party if the other party becomes the subject of a petition in bankruptcy or any proceeding relating to insolvency, receivership, or liquidation for the benefit of creditors, if such petition or proceeding is not dismissed within 60 days of filing.

13.3 Unacceptable Use. Hurricane may immediately terminate this Agreement if Customer violates any provision of the Hurricane Acceptable Use Guidelines that results or could result in suspension by Hurricane.

13.4 For Other Cause. Except as otherwise stated, either party may terminate this Agreement if the other party breaches any material term or condition of this Agreement and fails to cure such breach within ten (10) days after receipt of written notice of the same.

13.5 Effect of Termination. Upon expiration or termination of this Agreement: (a) Hurricane will cease providing the Services; (b) except in the case of termination by Customer pursuant to Section 13.4, all of Customer payment obligations under this Agreement, including but not limited to monthly Service Fees through the end of the Term indicated on the Quote(s) will become due in full immediately.

14. Survival. The Parties' respective representations, warranties, and covenants, together with obligations of indemnification, confidentiality and limitations on liability will survive the expiration, termination or rescission of this Agreement and continue in full force and effect.

15. Miscellaneous Provisions.

15.1 Force Majeure. Other than with respect to failure to make payments due hereunder, neither party shall be liable under this Agreement for delays, failures to perform, damages, losses or destruction, or malfunction of any equipment, or any consequence thereof, caused or occasioned by, or due to fire, earthquake, flood, water, the elements, labor disputes or shortages, utility curtailments, power failures, explosions, civil disturbances, governmental actions, shortages of equipment or supplies, unavailability of transportation, acts or omissions of third parties, or any other cause beyond its reasonable control.

15.2 No Lease. This Agreement is a services agreement and is not intended to and will not constitute a lease of or tenancy or other interest in the Colocation Space or other Hurricane premises, the Hurricane Equipment or any other real or personal property.

15.3 Government Regulations. Customer will not export, re-export, transfer, or make available, whether directly or indirectly, any regulated item or information to anyone outside the U.S. in connection with this Agreement without first complying with all export control laws and regulations which may be imposed by the U.S. Government and any country or organization of nations within whose jurisdiction Customer operates or does business.

15.4 Assignment. Neither party may assign its rights or delegate its duties under this Agreement either in whole or in part without the prior written consent of the other party. Any attempted assignment or delegation without such consent will be void. This Agreement will bind and inure to the benefit of each party's successors and permitted assigns.

15.5 Notices. Any required notice hereunder may be delivered personally or by courier; sent by confirmed facsimile; or mailed by registered or certified mail, return receipt requested, postage prepaid, to either party at the name and address on the signature page of this Agreement, or at such other address as such party may provide to the other by written notice. Such notice will be deemed to have been given as of the date it is delivered personally or by courier, or five (5) days after it is sent by confirmed facsimile or mailed.

15.6 Relationship of Parties. This Agreement will not establish any relationship of partnership, joint venture, employment, franchise or agency between the parties.

15.7 None.

15.8 Choice of Law. This Agreement will be governed by and construed in accordance with the laws of the State of California, excluding its conflict of laws principles.

15.9 Venue. In the event that suit shall be brought by either party to this contract, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or where otherwise appropriate, exclusively in the United States District Court, Northern District of California, San Jose, California.

16. General. This Agreement, together with the Quote(s) referred to in this Agreement is the complete agreement and understanding of the parties with respect to the subject matter hereof, and supersedes any other agreement or understanding, written or oral. This Agreement may be modified only through a written instrument signed by both parties.